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No. 87-1200

In the Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY, ET AL., PETITIONERS

v.

AUBURN UNIVERSITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the disqualification of a judge under 28 U.S.C. 455(b)(1) may be based on evidence that was not presented to the district court assigned initial responsibility for resolving the disqualification issue.

2. Whether a state university has standing under the Equal Protection Clause or Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 828 F.2d 1532. An earlier opinion of the court of appeals (Pet. App. 139a-154a) is reported at 791 F.2d 1450. The opinion of the district court with respect to the motion to recuse (Pet. App. 41a-61a) is reported at 582 F. Supp. 1197. The opinion of the district court with respect to the merits of the controversy (Pet. App. 62a-138a) is reported at 628 F. Supp. 1137.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1987. On December 29, 1987, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 19, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits recipients of federal financial assistance from discriminating on the basis of race in federally assisted programs or activities. In July 1983, the United States filed suit in the United States District Court for the Northern District of Alabama, alleging that the State of Alabama, the Alabama State Board of Education, and all state-supported four-year institutions of higher education in the State of Alabama, including Alabama State University (ASU) and Alabama A & M (A & M), two historically and predominantly black colleges, had been maintaining a racially segregated system of higher education in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 3a). Both ASU and A & M, however, moved for realignment as parties-plaintiff on the ground that their interests were antagonistic to those of the other defendants (*id.* at 5a n.1). In addition, John F. Knight moved to intervene as representative of a plaintiff-class of ASU graduates, black adults and minor children in Alabama presently attending or eligible to attend an Alabama higher education institution in the relevant geographic area, and black citizens who are or may be employed by these higher education institutions (*id.* at 4a-5a). The district court, with the Honorable U.W. Clemon presiding, granted these motions (*id.* at 4a-5a, 12a).

In September 1983, however, Auburn University and the State Superintendent of Education moved, pursuant to 28 U.S.C. 144 and 455, to disqualify Judge Clemon (Pet. App. 12a).[1] They argued that Judge Clemon's children were potential members of the plaintiff-class; that Judge

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[1] 28 U.S.C. 144 and 455 are reprinted in full at Pet. App. 13a-15a n.21.

Clemon had represented the plaintiffs in *Lee* v. *Macon County Bd. of Educ.*, 317 F. Supp. 103 (M.D. Ala. 1970), aff'd in part and modified in part, 453 F.2d 524 (5th Cir. 1971), a case which allegedly involved some of the same parties and presented some of the same issues; and that Judge Clemon knew and was sponsored for the bench by a member of the law firm that now represented Alabama A & M (Pet. App. 12a-13a, 18a-23a). Judge Clemon summarily rejected these arguments, finding that the affidavits accompanying the motions had not been signed by "parties," as required by 28 U.S.C. 144, and that a reasonable person viewing the true facts would not harbor doubts concerning his impartiality, as required by 28 U.S.C. 455 (Pet. App. 12a).

Auburn University filed a petition for a writ of mandamus to the court of appeals with respect to the disqualification issue (Pet. App. 12a). The court of appeals granted the petition and remanded the case "with directions that another judge be assigned to hear the recusal proceedings" (No. 83-7557 (11th Cir. Nov. 10, 1983), slip op. 1). Judge Hobart Grooms was then assigned to the case (Pet. App. 12a). He held an evidentiary hearing with respect to this matter and, on December 19, 1983, ruled that Judge Clemon should be disqualified (*id.* at 12a-13a). On January 19, 1984, however, Judge Grooms vacated his order and recused himself from deciding the disqualification issue (*id.* at 13a).

Accordingly, Senior Judge David W. Dyer of the court of appeals was assigned to the case (Pet. App. 13a). He determined that Judge Clemon need not disqualify himself from the underlying matter (*id.* at 41a-61a). Judge Dyer found that the affidavits filed by Auburn University and the Superintendent of Education "fail[ed] to state material facts with sufficient particularity to convince a reasonable man that a personal bias exists" (*id.* at 45a).

2. The case then proceeded to trial, with Judge Clemon presiding (Pet. App. 5a). While the case was pending, however, the Alabama State Board of Education determined that it would not recertify certain undergraduate and graduate teacher education programs of ASU (*id.* at 140a-141a). ASU and the Knight intervenors promptly moved the district court preliminarily to enjoin the Alabama State Board of Education from doing so (*id.* at 141a). On August 21, 1985, the district court issued the requested preliminary relief, finding that the decision not to recertifiy the teacher education programs was racially motivated and that the status quo should be maintained until the underlying action brought by the United States could be resolved (*id.* at 141a, 151a). On December 7, 1985, the district court found that, until 1965, each public college in Alabama was segregated by law and by custom, that between 1965 and 1975 the defendants had engaged in a series of actions which continued the racially dual system, and that the vestiges of the pre-1965 and 1965-1975 actions continued to exist in the Alabama higher education system (*id.* at 5a-6a, 62a-138a). Accordingly, it ordered the State, the Governor, the Alabama State Board of Education, and the Alabama Public School and College Authority to submit a remedial plan consistent with its findings to " 'eliminate all vestiges of the dual system' " (*id.* at 7a). All further proceedings were stayed, however, pending disposition of the defendants' appeals (*ibid.*).

3. In an opinion and order rendered on June 6, 1986 in review of the district court's August 21, 1985 order (Pet. App. 139a-154a), the court of appeals upheld the preliminary relief issued by the district court against denial of recertification of ASU teacher education programs. It first ruled that ASU did not have standing under either the Fourteenth Amendment or Title VI to challenge for its

own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part (*id.* at 141a-142a). The court found that "ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983" (*id.* at 144a) and that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute" (*id.* at 146a).[2] Concomitantly, however, the court found that "the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate" (*id.* at 151a), reasoning that "[t]he standing of the * * * intervenors remains unchallenged" (*id.* at 147a), that "even the partial demise of ASU would impede the ability of the trial court—and this [c]ourt on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors" (*id.* at 152a), and that "the intervenors had a substantial likelihood of success on the merits" (*ibid.*). Thus, the court affirmed "entry of this injunction, on behalf of the intervenors, against the members of the [S]tate Board in their official capacities," and reversed "the district court's entry of any injunction on behalf of ASU * * *" (*id.* at 153a).[3]

4. On October 6, 1987, the court of appeals reviewed the district court's December 7, 1985 order, determined that Judge Clemon should have been disqualified from hearing the case and, accordingly, reversed and remanded

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[2] The court, however, rejected the "broad contention that [ASU], as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States" (Pet. App. 142a).

[3] The Board of Trustees of Alabama State University petitioned for certiorari on the court of appeals' ruling as to standing. The Court denied the petition (No. 86-749 (Feb. 23, 1987)).

without reaching the merits (Pet. App. 1a-40a).[4] It agreed with the district court that neither the presence of Judge Clemon's two minor children in the plaintiff class nor the judge's background as a civil rights lawyer and political figure in Alabama required disqualification (*id.* at 18a-23a). But the court held that Judge Clemon's involvement as a legislator with the matters at issue in the litigation did require the trial judge's disqualification (*id.* at 23a-29a).

The court rested its holding on the fact that, "[d]uring his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit" (Pet. App. 23a (footnote omitted)). Specifically, it found that, "[a]s chairman of the Senate Rules Committee, Judge Clemon played a critical role in the confirmation of those individuals nominated for positions on the board of trustees of the defendant institutions" (*id.* at 23a-24a), and "[y]et Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in this finding of liability" (*id.* at 25a). It further found that, "[w]hile in the statehouse, Judge Clemon also helped spearhead a bill to appropriate $10,000,000 to Alabama A & M" (*ibid.*), yet "[a]t trial, A & M cited the defeat of this bill as evidence of racial animus" and thus "Judge Clemon was again forced to make factual findings about events in which he was an active participant" (*ibid.*). Finally, it found that Judge Clemon's involvement as a lawyer in the

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[4] The court also held (Pet. App. 29a-39a) that the United States had improperly alleged that the entire system of public higher education was covered by Title VI and had failed to identify the particular programs or activities at individual colleges receiving federal funds. The court instructed (*id.* at 39a) that, on remand, the United States should prepare and file a new complaint.

Lee v. *Macon County Bd. of Educ., supra,* litigation provided him with information relating to the discrimination suffered by black high school principals, a subject on which evidence was also presented in this case (Pet. App. 26a-27a). The court concluded that, as a result of his involvement in these matters, 28 U.S.C. 455(b)(1) required his disqualification, since Judge Clemon had "personal knowledge of disputed evidentiary facts concerning the proceeding" (Pet. App. 27a).

In reaching this conclusion, the court rejected the claim that it should "not consider Judge Clemon's activities as a state Senator since these facts were not presented to Judge Dyer" (Pet. App. 23a n.49). It acknowledged that "[t]he question of whether considerations of timeliness apply under [28 U.S.C.] 455 is a difficult one," noting that "Congress did not incorporate a time limitation into the amended statute, and courts have differed as to whether the timeliness requirement of the prior [Section] 455 survived" (*ibid.*). But the court ruled that, "[e]ven if the principle of timeliness has some application to motions brought under [Section] 455(b), it would be inappropriate to apply this principle under the circumstances of this case" (*id.* at 24a n.49). It reasoned that "[t]hose courts that have adopted a timeliness requirement have done so 'to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to "sample the temper of the court" before deciding whether to raise an issue of disqualification' " (*ibid.* (citations omitted)), that "[a]ppellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim" (*ibid.*), that "[m]otions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout" (*ibid.*), that "[a]ppellants did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and

raised this ground for disqualification at the first available moment" (*ibid.*); and, finally, that "[g]iven the critical importance of the appearance of impartiality guaranteed by [Section] 455," it would not "adopt the cramped interpretation of this statute asserted by appellees" (*ibid.*).

ARGUMENT

The decision of the court of appeals does not merit review by this Court. Although the United States adheres to its position that disqualification was improper since the claims were either untimely or lacking in merit, it is clear that the disqualification issue is essentially a factual one and that the resolution of this issue by the court below does not conflict with any decision of this Court or of any other court of appeals. Moreover, this Court has already declined to review the question whether ASU has standing to challenge for its own benefit the racially discriminatory actions of the state-created system of which it is a part (No. 86-749), and the question is no more deserving of review at this time.[5] Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners initially err in suggesting (Pet. 14-15) that the decision below conflicts with the holdings of other courts that a litigant must raise in a timely fashion the grounds on which it seeks to disqualify a judge under 28 U.S.C. 455(b). To be sure, there is a conflict among the circuits on this question (compare *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) (party may not await outcome of trial before seeking to disqualify trial judge on basis of information known to party before trial); *Delesdernier* v. *Porterie*, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839 (1982) (same); and

[5] We are lodging with the Clerk and sending to petitioners a copy of our brief in opposition in No. 86-749.

United States v. *Conforte*, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980) (same), with *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)). This conflict may be short-lived, however, because, as petitioners concede (Pet. 15 n.8), the Seventh Circuit "appears to be ready to reconsider." Moreover, the court of appeals in this case did *not* decide whether a time limitation applies to disqualification motions under 28 U.S.C. 455(b). Rather, it held that, even assuming that such a limitation applies, the motion for disqualification in this case was timely filed (Pet. App. 23a-24a n.49). The court found that "[m]otions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout," and that "[respondents] did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification at the first available moment" (*ibid.*). Accordingly, the decision below does not add to the circuit conflict or provide a vehicle for resolving it.

2. Petitioners similarly err in suggesting (Pet. 15-18) that the decision below conflicts with decisions of other courts in which remands were ordered to permit the development of a factual record on the disqualification issue. In the cases that petitioners cite, the remands were ordered because the facts material to the disqualification issue were in dispute. See *Health Services Acquisition Corp.* v. *Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), cert. granted, No. 86-957 (Mar. 9, 1987); *Price Bros.* v. *Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981); *United States* v. *Conforte*, 457 F. Supp. 641, 645 (D. Nev. 1978). Here, by contrast, the court of appeals apparently concluded that the facts material to the disqualification issue were not in dispute and that the issue could be resolved without further

factfinding by a district court; the court of appeals believed that the undisputed facts established that Judge Clemon was intimately involved as a state legislator with matters at issue in this case. See Pet. App. 23a-29a. Accordingly, its decision not to remand the case for further proceedings is not in conflict with the decisions that petitioners cite.[6]

3. Petitioners next argue (Pet. 18-22) that the facts upon which the court of appeals relied do not require Judge Clemon's disqualification. But the question is inherently fact-bound and non-recurring. Accordingly, in our view, it is not sufficiently important to justify review by this Court.[7]

4. Finally, petitioners err in suggesting (Pet. 22-27) that the court of appeals erred in holding that ASU and A & M were without standing under either the Equal Protection Clause or Title VI to challenge for their own benefit the racially discriminatory actions of the state education system of which they are a part. This Court has long held that, "[b]eing but creatures of the State, municipal corporations have no standing to invoke the * * * provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939) (footnote omitted). See generally *Williams*

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[6] Petitioners note (Pet. 13-14) that this Court has granted certiorari and heard argument in *Liljeberg*, which involves a question concerning the timeliness of a disqualification motion under 28 U.S.C. 455(a). But petitioners properly do not ask that their petition be held pending the disposition of *Liljeberg*. That case involves allegations concerning the "appearance of impropriety" of a judge, not personal knowledge of important facts. Accordingly, the decision there should not bear on the proper resolution of the timeliness question that sometimes arises under 28 U.S.C. 455(b).

[7] There is no basis for petitioners' suggestion (Pet. 14) that the disqualification decision in this case was based upon Judge Clemon's race.

v. *Mayor of Baltimore,* 289 U.S. 36, 40 (1933); *Risty* v. *Chicago, R.I. & Pac. Ry.,* 270 U.S. 378, 389-390 (1926); *Trenton* v. *New Jersey,* 262 U.S. 182, 188 (1923); *Hunter* v. *Pittsburgh,* 207 U.S. 161, 179 (1907). Title VI likewise is designed to protect individual rights and, in enacting that statute, Congress made no suggestion that it was granting state-created entities any rights that heretofore were unavailable under the Fourteenth Amendment. Cf. *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause"); *id.* at 328 (opinion of Brennan, White, Marshall, Blackmun, JJ.) (same). Accordingly, the decision of the court below—that state-created entities like ASU and A & M may not rely on either the Equal Protection Clause or Title VI to challenge for their own benefit the discriminatory actions of the state that created them—is correct.

Petitioners acknowledge (Pet. 23) that "a line of cases [from this Court exists] holding that disputes between arms or creatures of a State do not normally implicate federal rights." But petitioners repeat the argument that was advanced, and that this Court declined to review, in No. 86-749, to wit, that the court of appeals failed to consider cases "which have allowed claims such as those asserted here when they were brought by state-created entities or their board members, in pursuit of their obligation under the Supremacy Clause to conform their conduct to the federal Constitution or a federal statute" (Pet. 23). As we noted in our brief in opposition in No. 86-749 (at 6), however, the court of appeals could not consider an argument that was not presented to it. ASU did not argue to the court of appeals that it was representing the interests of its students, faculty, or administrators, or that it was

pursuing an obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute.

Rather, ASU argued only that it had standing as an *institution* to seek the preliminary injunction. Thus, in answering respondents' argument to the court of appeals that petitioner ASU was without standing, ASU contended only that "Alabama State University as a creature of the State has federally protected rights under the Constitution and the Laws of the United States" (ASU C.A. Br. 21). Accordingly, the court below had only to decide "whether any given constitutional provision or law protects *the interests of the body in question,*" to wit, ASU. See Pet. App. 143a-144a (emphasis added). Petitioners' recharacterization of the cause in this petition for a writ of certiorari cannot change the question presented to and decided by the court below.[8]

Petitioners therefore err (Pet. 22-26) in suggesting that the decision below conflicts with decisions of this Court and other courts which have held that state-created entities may challenge on behalf of their students, faculties, and board members the discriminatory actions of their state-creators. The school boards in the cited cases either alleged that a state statute or some other state action required a constitutional or statutory duty to be violated by board members (see, *e.g.*, *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Board of Educ.* v. *Allen*, 392

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[8] As we noted in our brief in opposition in No. 86-749 (at 6 n.1), it may be that ASU *intended* to argue to the court of appeals that it was representing the interests of its students, faculty, and administrators, as well as the interests of the institution as a whole. But, as we also noted there (*ibid.*), ASU did not make these intentions clear to the court of appeals and, accordingly, the fault in the decision below, if any, lies with ASU, not with the court of appeals.

U.S. 236 (1968)), or that they were representing the constitutional rights of their students or faculty (see, *e.g.*, *Akron Bd. of Educ.* v. *State Bd. of Educ.*, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974); *Bradley* v. *School Bd.*, 338 F. Supp. 67 (E.D. Va.), rev'd on other grounds, 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided court, 412 U.S. 92 (1973); *School Bd.* v. *Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987)). Here, by contrast, ASU alleged only that its own rights as an institution were in issue. Thus, it is clear that petitioners ask this Court to resolve a conflict that does not exist.

The suggestion (Pet. 26-27) that the decision below "leaves a significant gap in the means of protecting the constitutional rights of [their] students" is equally meritless. The United States and the intervenors in this litigation have adequately represented and will continue adequately to represent the students and faculty of the Alabama schools—the persons who would truly benefit from the desegregation of the Alabama system of higher education.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

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Association (CCTA) request reconsideration of the interim must carry rules on the grounds they unconstitutionally intrude on the First Amendment rights of cable operators, programmers and subscribers.

20. TBS argues that the interim must carry rules are a prior restraint on constitutionally protected speech in that they preclude cable operators' programming selections, compel certain substitutions, and impose severe sanctions for refusals to comply. Thus, it states that there is a heavy presumption against their constitutional validity and that a standard of review more stringent than the *O'Brien* standard should apply. TBS further argues that the new rules are unconstitutional even under the more lenient *O'Brien* standard. It states that the Commission failed to demonstrate that maximizing viewer choices is a substantial governmental interest that would be harmed in the absence of must carry rules. In this regard, TBS criticizes the Commission for adopting interim must carry rules despite its findings that cable systems have continued to carry local stations since the former must carry rules were invalidated and that viewer choice is increased where cable systems do not carry local stations. In addition, it states that the Commission failed to adequately investigate the market situation with respect to the use and availability of built-in and outdoor antennas and takes the position that the Commission is obligated to show that a six month consumer education program is insufficient to rectify any existing problem of subscriber awareness of the need for alternative reception capabilities.

21. TBS further states that the interim must carry rules are not narrowly tailored to meet the purported need. In this regard, it specifically criticizes the exemption of smaller cable systems from must carry obligations, the 25 percent channel capacity cap, the five year term of the interim must carry rules, the requirement that cable systems carry duplicating noncommercial stations, the viewing standard and the requirement that must carry signals be

carried on the lowest-priced separately available tier of service. TBS thus requests that we eliminate the interim must carry rules.

22. Century argues that the interim must carry rules are content-based and, thus, *O'Brien* is not the appropriate standard for review. In this regard, Century states that in making their programming judgments, cable operators exercise their editorial discretion relative to speech content. Thus, Century argues, the rules directly interfere with communicative activity by designating certain sources that must be included by cable editors and by according preferences to certain favored classes of speakers, such as those who are local and popular. Century also claims that *City of Renton v. Playtime Theatres, Inc. (Renton)*[9] is inappropriately applied by the Commission in its constitutional analysis of the new regulations, as the rationale for time, place and manner restrictions cannot be used to condone intrusions into program content and distribution. It further argues that Without *Renton*, the Commission's rationale cannot be sustained. Century concludes that the Commission's constitutional analysis of the must carry rules improperly blends content regulation with market entry and other non-communicative aspects of cable television. Therefore, Century seeks elimination of the interim must carry rules.

23. CCTA takes the position that the five year sunset provision does not justify unconstitutionally intruding on First Amendment rights. It cities *Century Federal, Inc. v. City of Palo Alto (Century Federal)*,[10] for the proposition that intrusions on cable operators' speech rights are not acceptable merely because they are limited in duration. CCTA thus argues that the infirmity of the interim must carry rules is not cured by the five year sunset provision.

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[9] 106 S.Ct. 925, 54 U.S.L.W. 4160 (1986).

[10] 648 F. Supp. 1465 (N.D. Cal., Dec. 3, 1986).

CCTA proposes that if the Commission decides to retain the interim must carry rules, then it should select a shorter interim period that is more in keeping with the regulatory program goal of educating consumers. In this regard, it argues that there is nothing in the record of this proceeding to suggest that a five year period is needed to accomplish the educational task.

24. CCTA also submits that input selector switches should not be mandatory; rather, they should be available for sale or lease to subscribers who request them pursuant to a strong information requirement, somewhat like the cable "parental control" device. As CCTA sees it, this modification offers two advantages: 1) it would not impose unnecessary costs on customers who do not need or desire an input selector switch; and, 2) it would allow a market for built-in input selector switches to develop. CCTA contends that the Commission's approach, if implemented, would impede the development of That market because subscribers would have no reason to buy receivers with built-in switches if cable systems provide switches for free.

25. The Texas Cable TV Association, filing jointly with four other cable interests. (Texas Cable) contends that the consumer education information requirement is unconstitutional since the Supreme Court has outlawed mandatory "consumer interest" messages of the kind adopted by the Commission to effect its decision. In support, it cites Pacific Gas and Electric v. P.U.C. of California (Pacific Gas),[11] which, it states, held that mandated access to "extra space" in billing envelopes for consumer advocacy group messages violated the First Amendment rights of a regulated utility. Moreover, Texas Cable maintains that the education program is inconsistent with the Commission's underbrush decisions to leave the regulation of broadcasters' trade practices to the FTC and the Better Busi-

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[11] 106 S.Ct. 903, 54 U.S.L.W. 4149 (1986).

ness Bureau, and with the 1985 Fairness Report, in which the Commission determined that the public interest is not served by forcing broadcasters to telecast messages on controversial issues of public importance.

26. The Association of Independent Television Stations, Inc. (INTV) requests reconsideration of the sunset provision of the interim must carry rules. INTV contends that it is unlikely that the "fair and open competitive market environment"[12] for programming sought by the Commission can be achieved within five years through the input selector switch and consumer education requirements. It argues that various cable and broadcast industry studies and reports, including that submitted by the Joint Petitioners as discussed above, demonstrate that input selector switches are flawed, ineffective mechanisms for recapturing the access to off-the-air broadcast signals that is lost when cable service is installed.

27. INTV cites the NCTA and NAB studies, which, it states, show the technical problems with the input selector switch plan. Additionally, INTV states that it pointed out in its original comment in this proceeding the difficulties in using input selector switches with cable-ready sets and/or videocassette recorders (VCRs). It also submits that input selector switches are totally unusable for many TV viewers who are prohibited from erecting outdoor TV antennas, live in apartment buildings, or otherwise "cannot or will not" use input selector switches due to local zoning regulation or complexity of operation.

28. INTV further argues that even if the input selector switch rules did provide adequate subscriber access to off-the-air broadcast signals, the market environment envisioned by the Commission will never be achieved unless and until Congress and the Commission eliminate a panoply of regulatory and statutory policies that insulate cable

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[12] *See Report and Order, supra* at para. 133.

systems from the market in which broadcasters compete. According to INTV, these policies include: 1) the cable compulsory copyright license; 2) entry barriers to cable competition from telephone companies, broadcast stations, and television networks; and, 3) Commission-approved abrogation of local television stations' exclusive local program exhibition licenses. It states that sunset of the must carry rules will, absent concurrent actions on the part of the Commission and Congress, leave undisturbed this regime of "cable friendly" regulation that insulates cable from the forces of marketplace competition. Thus, INTV argues that the government interest in maximizing diversity in program choices and fostering competition among program sources will be ill-served in the absence of ongoing, limited signal carriage rules.

29. INTV is also concerned that the Commission apparently "dismissed" Section 307(b) of the Communications Act, which requires that radio frequency services be distributed "among the several states and communities" in a fair and equitable manner, as a component of the federal interest supporting the interim must carry rules. It submits that localism and free, local broadcast service remain preeminent communications policy objectives and important federal interests. INTV states that there is no statutory interest comparable to that expressed in Section 307(b) for non-local program services available only to persons who are willing to pay for them. It submits that the Commission's seeming equation of free local broadcast service with non-local, subscription? narrowcast services such as cable networks is, therefore, unwarranted! It argues that the Commission's disregard for Section 307(b) is unwarranted, unsupportable, and inconsistent with its statutory mandate and must be corrected on reconsideration.

30. INTV requests that the interim must carry rules be retained until the fair and competitive market environment we seek has actually been achieved. It suggests that we adopt a system-by-system sunset of our must carry rules

to be effective upon: 1) elimination of all the above-mentioned governmentally mandated protections of cable systems from the free market in which local broadcasters and all other video program distributors must operate; and, 2) introduction of intra-modal competition, that is, a second cable system into the community. In the alternative, INTV requests adoption of the "permissible signal carriage" rule which it initially proposed in this proceeding. Under that proposal, the cable operator would choose either to invoke the compulsory copyright license by carrying all "local" signals or to negotiate separately with copyright holders for use of their work. INTV further submits that if we decide to retain The five-year sunset provision, we should indicate willingness to consider, as an aspect of our consideration of continuing relief in particular situations where continuing signal carriage rules might be necessary, the possibility of extending the rules beyond their scheduled expiration date.

31. To support ongoing signal carriage rules, INTV argues that the Commission's constitutional analysis should rely more confidently on the standard established in *O'Brien* and other applicable Supreme Court decisions. In this respect, INTV states that the Commission's analysis is basically correct but is not complete. It submits that the Court's holding in *Renton* makes clear that regulations which are not aimed at suppression of speech, that is, those that are "justified" without reference to the content of the regulated speech, are constitutional if they are designed to serve a "substantial government interest" and "allow for reasonable alternative avenues of communications."[13] INTV asserts that the interim must carry rules, without the input selector switch rules, satisfy this test, including the second part of it, by leaving at least 75 percent of cable system' channel capacity free from any signal carriage obligation. If further argues that the in-

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[13] *Renton, supra* at 928-930.

terim must carry rules clearly satisfy the *O'Brien* standard even in the absence of the Court's decision in *Renton.* In this respect, INTV observes that the Court recently affirmed in *United States v. Albertini (Albertini)*[14] that "an incidental burden on speech is no greater than essential, and therefore permissible under *O'Brien,* so long as the content-neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

32. Richard Leghorn seeks revision of our basic approach for resolving the must carry matter. He submits that we took the good idea of relying on input selector switch requirements as a long term means to achieve our goals, but then misapplied it in a manner that satisfies no one and fails to accomplish those goals. Specifically, Leghorn objects to what he terms are: 1) our unnecessary and excessive reliance on external switches; 2) the massive information campaign required of cable operators to cure a market dysfunction caused by the former rules; and, 3) the five additional years of unnecessarily intrusive must carry rules. He contends that we did not develop a complete record on input selector devices and, thus, we failed to satisfy the requirements of administrative rule making and we further failed to identify the least intrusive means of achieving our policy objectives. Leghorn argues that the two-part regulatory program is technically impractical and infringes the First Amendment rights of cable operators.

33. Leghorn argues that the *Report and Order* fails to recognize that, in the long term, input selector switches built in during the manufacture of television receivers are significantly superior to external switches. He states that there are a number of advantages to use of electronic, internal switches, including: 1) purchase and maintenance costs would be lower; 2) technical performance would be

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[14] 472 U.S. 675, 105 S.Ct. 2897, 2907 (1985).

substantially better; 3) the dangers of signal leakage to air navigation and increased risks of lightning harm resulting from poor grounding would be practically eliminated; and 4) the home television environment would be "friendlier" for consumers. Leghorn asserts that our input selector switch rules will suppress demand for receivers with internal switches because cable subscribers will not purchase receivers with built-in switching capability when they are provided mechanical, external switches free of charge.

34. Leghorn characterizes the consumer education program as, in effect, compelling cable operators to advertise the availability of their off-the-air competition, an approach which he says will greatly waste time and money and engender consumer confusion and resentment. Leghorn contends that the education requirement cannot be justified as a mere consumer protection mechanism, since it directly forces an industry to advertise the whereabouts of its competitors without requiring any effort by the competitors themselves. Consequently, Leghorn submits that the consumer education program is unconstitutional, as cable operators may not wish to use their facilities to advertise their competition, and these rules will in many instances compel operators to speak. In support, Leghorn principally cites *Pacific Gas*, in which he states the Supreme Court agreed with the contention of a regulated utility that it had a First Amendment right not to be required to use its own property to help spread a message with which it disagrees. Texas Cable essentially agrees with this analysis. Leghorn proposes that responsibility for carrying the burden of consumer education be shifted to broadcasters and/or the Commission.

35. Finally, Leghorn asserts that the interim must carry rules are unconstitutional. He argues that more exacting scrutiny than the *O'Brien* standard is required to evaluate these rules. In this respect, Leghorn contends that the Commission's interpretation of *Renton* in its rationale for

applying *O'Brien* was incorrect. He argues that *Renton* only applies when the regulation at issue is not directed at the content of the communications involved, and that it does not stand for the proposition that any regulation is content-neutral simply because it is viewpoint-neutral. He futher states that by contrast with the situation in *Renton*, the interim must carry rules are directly concerned with the content of speech because they rank categories of speech and speakers. Leghorn also contends that the Commission incorrectly applied the *O'Brien* test by ignoring the impact the must carry rules will have on the content of a cable operator's speech. In addition, he asserts that the rules coerce speech by forcing cable operators to retransmit television programming which they might not otherwise carry.

36. In view of the above, Leghorn requests that we conduct a supplemental inquiry to develop a public record on the relative costs, technical performance, safety, and consumer convenience aspects of external switches versus switches that are built-in to television receivers, including current designs and feasible improvements in such devices. He proposes that, after conducting this injury, we adopt rules generally in accordance with his earlier proposal to require manufacturers to build switches into television receivers and related control equipment, and require cable systems for an interim period to provide external switches only when they choose not to carry all local VHF signals. He maintains that the Commission has authority to mandate these built-in switches under the All-Channel Receiver Act of 1962, 47 U.S.C. §303(s). Leghorn also suggests that his proposal be modified to require that cable operators who do not carry all local VHF signals provide external switches, but be permitted to charge for their installation. He states that this will alleviate our concern that his proposal would operate as an incentive for cable systems to carry a fixed set of signals as a way to avoid expenses. Leghorn further requests that we adopt performance spec-

ifications as a means to ensure that manufacturers develop switches that consumers can safely install themselves.

37. Taft Broadcasting Company (Taft) urges the Commission to issue a Notice of Inquiry to investigate the technical adequacy of input selector switches, the extent to which viewers are in fact able to erect antennas, the comparative quality of off-the-air signals and the cable signals of the same station, and the extent to which viewers will choose to watch a superior quality television signal over a signal of inferior quality even when the viewer might prefer programming content of the inferior signal. Taft suggests that the Commission continue to suspend the input selector switch requirements and the five year sunset period pending the outcome of the inquiry, but that it implement the new must carry rules to ensure that cable subscribers will continue to have access to off-the-air television stations.

38. Range Television Cable Co., Inc. (Range) urges the Commission to reconsider its input selector switch rules to create an exemption for cable systems that provide all available off-the-air broadcast signals to their subscribers as part of their basic tier of cable service. Range submits that the effect of the rules adopted is to cause cable systems carrying all local signals to incur the additional expense of installing input selector switches for no good reason and, at the same time, cause increased costs for subscribers.

39. Continental Cablevision, Inc. (Continental) states that it generally supports the NCTA, CATA and NAB petition and strongly opposes the blanket requirement to install input selector switches without regard to whether a cable system is inhibiting the reception of local television signals. In this regard, Continental states that it would not oppose a rule requiring installation of an input selector switch at any future date (even after the sunset of the interim must-carry rules) for subscribers of systems that

cease to carry signals defined by the Commission's rules as local. Such an exemption also is supported by the National Independent Television Committee (NITC), which requests in the alternative that the input selector switch rule not be applied Where cable systems are subject to full competition, i.e., where telephone companies can offer cable television services and cable systems are not protected by the compulsory copyright license.

40. The Office of Communication of the United Church of Christ, Henry Geller, and Donna Lampert (UCC) submit a joint petition criticizing the new rules as an imposed government solution that looks good on paper but does not realistically address the important public policy interests at issue. UCC argues that input selector switches will never be an effective means for providing access to off-the-air signals that are not carried by a cable system. They point to the various technical problems with the switches indicated in the NCTA report, although they also suggest these problems are being exaggerated for tactical purposes. UCC believes that because of the inconvenience of switching to antenna reception and then tuning to a station, it is unlikely that consumers will actually use switches to gain access to a relatively few stations not carried by their cable system. They submit that the input selector switch requirement will impose costs on the industry and the public and will not further our policy objectives.

41. UCC also argues that we have not properly defined the public interest. They argue that we were incorrect in determining that the federal interest was concerned not with the service of particular local broadcasters, but rather with preserving during the interim period the program source diversity provided by the system of broadcasting. In this respect, UCC states that the preservation of local service is mandated by Section 307(b) of the Communications Act.

42. UCC argues that the proper analysis of the must carry situation is that cable has inserted itself into the broadcast signal distribution scheme and is, therefore, subject to reasonable Commission regulation to ensure that its actions are consistent with the foundations of that scheme. They assert that these foundations require the maintenance of healthy local broadcast outlets. They acknowledge that there is a changed circumstance—the development of many cable program services and the difficulty in carrying all broadcast and cable services on systems with limited channel capacity—that militates against mandatory carriage of all available broadcast signals.

43. Because of these changed circumstances, UCC submits that the Commission, if it is to act reasonably, must restrict mandatory carriage rights to those stations truly in need of cable carriage. They maintain that the categories of stations in need are those set forth in their comments and replies in this proceeding. Thus, they request must carry protection be established as follows: 1) carriage of all local stations in sparsely populated areas (e.g. blow the top 100 markets), regardless of channel capacity; 2) carriage priority for public broadcasting stations, community stations, and UHF independents (initial license period) in situations involving cable systems with limited capacity in the top 100 markets. Under the UCC proposal, there would be no mandatory carriage for VHF stations in the top 100 markets, regardless of cable system channel capacity, and no mandatory carriage would be afforded unless the station is serving as a significant local outlet, i.e. broadcasts more than 40 percent local programming directed to serving the needs and interests of the community.

44. They also argue that regulation that is reasonably related to the public interest in the signal carriage matter would not violate the First Amendment. UCC submits that cable interests cannot insist upon the right to import dis-

tant signals, to the detriment of local signals in rural areas, of new UHF independents, or of local public broadcasting service. Moreover, they contend that even if the *O'Brien* test were used, the approach in their proposal would easily pass constitutional muster in that it would provide protection for an important and substantial federal interest and its incidental impact on the alleged First Amendment freedoms would be the minimum necessary to the furtherance of that interest.

45. In its reply comments, Pico Macom, Inc., which states that it is the leading supplier of input selector switches for the cable industry, refutes petitioners' claims that there are technical problems with the available input selector switches that render them unsuitable for use with cable service. Pico Macom submits that its current switch, the "Macom AB-2" meets or exceeds all of the technical specifications required by the cable industry, including isolation, insertion loss, and return loss. It also states that its factory testing process proves that This switch will withstand at least 10 years of very hard use. Pico Macom also contends that Gill Industries, as discussed below, dramatically overstates the extent to which the use of a properly installed input selector switch will cause objectionable interference to television viewing.

46. Pico Macom also submits that petitioners, particularly Joint Petitioners, have greatly overstated the cost of compliance with the switch rules. It states that based on a poll of three major distributors, cable operators can purchase its switch for as little as $2.25 per switch. Pico Macom argues that Joint Petitioners also have inflated the long term cost of the switch by underestimating its useful life. It states that the actual switch life of 10 years will significantly reduce the costs of labor and hardware for switch replacement/repair claimed by Joint Petitioners. Pico Macom also submits that Joint Petitioners have overstated the costs of providing transformers for use with switches

because not every subscriber will need such a device.[15] Finally, it claims that petitioners have failed to recognize that the price of switches, transformers, and jumper cables is likely to fall by as much as 10 percent if the rule goes into effect, as production efficiencies will be realized with the increased demand.

Evaluation of Basic Policy Issues

47. We are not persuaded that we should alter the basic approach of our two-part program for resolving the must carry matter. In this respect, we find unpersuasive petitioners' arguments that we incorrectly assessed the federal interest and that the two-part program is an unworkable solution to the must carry matter. Rather, we continue to believe that the undesired effects of our former must carry rules will be best resolved by a regulatory program that includes both input selector switch and interim must carry requirements. This approach is both the most effective and the least intrusive means to achieve our objectives to alter consumers' existing practices and knowledge concerning the need for off-the-air reception capability and to provide an orderly transition to a new environment in which cable mandatory signal carriage regulation will no longer be necessary. We are confident that the fundamental approach of the program adopted in the *Report and Order* is the appropriate course of action in this matter. However, we recognize petitioners' argument that the program, is adopted, imposes significant costs and implementation burdens on the cable industry. Therefore, we are modifying certain provisions of the program. We believe that these modifications are responsive to

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[15] Pico Macom states that a transformer is necessary only if the subscriber's antenna is connected with 300 ohm flat wiring. It argues that in many instances antennas are connected to receivers with 75 ohm coaxial cable and, for support, points to the statement in Gill Industries' petition that 51 percent of its customers in the San Jose, California have only coaxial leads for antenna input.

petitioners' concerns and will enhance the long-term effectiveness of the basic two-part program to achieve our objective of ensuring viewers' access to the maximum number of program choices available through cable and off-the-air broadcast television facilities.

48. *The Federal Interest.* We find no merit in INTV's and UCC's position that we incorrectly or otherwise improperly treated Section 307(b) of the Communications Act as a component of the federal interest in the must carry matter. In the *Report and Order,* we observed that our assessment of the federal interest is premised on concerns different from the Section 307(b) concerns relied upon by the Commission in initially adopting the former must carry rules. We found that the structure of the overall video market has changed and that this change is primarily due to the emergence of the cable industry as a means for distributing new program services. These findings led us to conclude that it is no longer appropriate nor desirable to treat cable purely as a supplementary or auxiliary video distribution service and to protect local television service in competition with cable service. Therefore, consistent with the statutory goals contained in Sections 151 and 303(g) of the Communications Act, and Section 601 of the Cable Communications Policy Act of 1984 (Cable Act),[16] we determined that the public interest would be better served by a policy that maximizes program choices rather than one that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers. While we did not, therefore, rely specifically on Section 307(b), we did find that the plan we adopted also contributes towards the Section 307(b) statutory goals.

49. We continue to believe that it is desirable to proceed toward an environment where we no longer will protect

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[16] 47 U.S.C. §§151 and 303(g); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §§1 *et seq.*, 98 Stat. 2779 (1984).

the broadcast industry from competition with the cable industry.[17] In maintaining this position, we are cognizant of our mandate to distribute radio frequency services "among the several states and communities" in a fair and equitable manner. We believe our two-part program contributes to Section 307(b) objectives by fostering independent access to local off-the-air television services so that such stations may operate in a fair and open competitive environment with other providers of video services. To protect the broadcast industry *per se* in furtherance of Section 307(b), would have the effect of limiting access to program choices. Such a policy might diminish the overall public interest with respect to our mandate to "make available to all the people of The United States a rapid, efficient communications service" and to "generally encourage the larger, more effective use of radio" under Sections 151 and 303(g) of the Communications Act. It might also impede the intent of the Cable Act, as expressed in Section 601 thereof, to establish a national policy that encourages the growth and development of cable services and assures that cable systems are responsible to the needs and interests of the local communities They serve.

50. *Feasibility of Input Selector Switches.* We believe that the technical problems described by those seeking elimination of the input selector switch requirements are much overstated. First, improper installation of switches by subscribers is not likely to be a cause of harmful signal leakage. Cable subscribers generally will be able to install these devices properly themselves if they are provided with appropriate instructions, including directions to immedi-

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[17] Nothing in this Memorandum Opinion and Order is intended to prejudice our decision on any of the issues raised by Satcom, Inc. in its petition for rule making proposing rules relating to multiple ownership of cable systems. The Commission requested comments on that petition in a Public Notice issued June 19, 1986, RM-5475.

ately check for proper switch operation. The primary potential for interference is that switches could be installed such that the cable output would be connected directly to the antenna, and thus would radiate the full bandwidth of the input cable signal. Such connections will not be a major problem because when they do occur, the switch will be unable to alternate between the input sources and the installer/subscriber will realize immediately that something is wrong and take corrective action. Another factor that must be considered in assessing the interference potential of input selector switches is whether a separate terminal device is used to receive cable service and, if so, whether the switch is installed on the cable or receiver side of the terminal device. Where a terminal device is used, and the switch is between it and the television receiver, the risk of interference resulting from improper installation is particularly low. In such cases, the direct connection of the terminal device output to the antenna through improper switch installation would result in radiation of only the device output. Because the output of the device is on a channel unused for broadcasting (generally either channel 3 or 4), the potential for interference created by accidentally coupling the terminal device to the antenna is very low. In cases where switches are built-in to television receivers and TV interface devices, the potential for interference is even less.

51. Evidence that subscribers can make complex cable connections correctly is provided by the fact that there have been no widespread problems or difficulties encountered by consumers in installation of cable-ready VCRs and receivers. We also observe that, as addressed in Gen. Docket No. 85-301, many cable subscribers now are acquiring and successfully installing their own cable terminal/converter equipment.[18] We are aware of no widespread or

[18] *See Notice of Proposed Rule Making* in Gen. Docket No. 85-301, 50 FR 42729 (1985); and *Further Notice of Proposed Rule Making* in Gen. Docket No. 85-301, 51 FR 31147 (1986).

general problem with consumers' installation of this equipment and believe that consumers also can correctly install input selector switches. In any event, those who contend consumers cannot properly install switches present no credible evidence to support their claim.

52. Second, we do not believe that input selector switches will degrade reception of cable service or permit signal leakage that will cause interference to off-the-air reception. Section 15.606(a) of our rules specifies a 60 dB isolation standard under which millions of transfer switches have been authorized (as components of video games, computers and other devices).[19] We are unaware of any interference to off-the-air reception attributable to any of these switches (mechanical or electronic), failing to isolate the antenna port sufficiently. Therefore, we believe that the 90 dB of isolation that Joint Petitioners claim is necessary to avoid these problems far exceeds that which is actually required in most instances. With regard to interference to cable reception, we observe that the signal strength received by the antenna and delivered to the receiver input terminals in most locations is substantially less than the 40 dBmV signal claimed by petitioners. Thus, for most installations, switch isolation of 60 dB appears sufficient to prevent interference to cable reception. In those areas close to broadcast transmitters, direct pick-up interference at the receiver tuner would frequently offset any additional protection provided by higher switch isolation. In those rare instances where greater switch isolation would be worthwhile, this fact could be brought to subscribers' attention so that they may act accordingly. We also find no evidence in the record to indicate that

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[19] Section 15.606(a) specifies a maximum voltage which may be generated at the antenna terminals of an antenna Transfer switch. For a typical cable system using 75 ohm coaxial cable and signal amplitudes of 3.16 millivolts (+10 dBmV), the switches must exhibit an isolation of at least 60 dB.

use of properly designed input selector switches would result in unacceptable insertion or return loss. In fact, as discussed by ATC and Pico Macom, switches that appear to provide acceptable technical performance are available now. Moreover, we are aware that similar switches are available from many other manufacturers and have been in use by cable subscribers for some time. We are aware of no reports of general leakage or other performance problems with any of the switches currently available. However, while we are confident that input selector switches can be used without leading to harmful interference, we recognize the importance of the switch technical performance issue and the need for appropriate standards to ensure that their use does not lead to harmful interference. Accordingly, we plan to initiate a separate proceeding, as discussed below, to consider technical standards for such switches.

53. Third, we find no merit in petitioners' arguments that input selector switches will fail or "wear out" even before the interim must carry rules expire. As Pico Macom indicates, reasonably priced switches that are capable of providing many years of service under heavy use are available now. Finally, we previously have addressed petitioners' claims that use of input selector switches would render unuseable certain features of cable subscribers' television receivers, VCRs and cable converters. As we stated in the *Report and Order*, any such problems can be overcome through relatively minor modifications to switching devices. Cable operators and other equipment suppliers can provide the information and/or assistance consumers may need to install switches in a manner that will enable operation of all the various features of video equipment.

54. Finally, we find no need to conduct further inquiry into the feasibility of input selector switch requirements as an effective element of our policy for resolving the must carry matter as argued by Taft and Leghorn. We disagree with petitioners who contend that the record in this pro-

ceeding did not provide sufficient information to support the input selector switch requirements. The record adduced at the *Report and Order* stage of this proceeding addressed issues and included evidence and information concerning the benefits and potential problems associated with use of input selector switches in connection with cable service. In any event, the abundant additional information submitted on reconsideration corrects any deficiencies that might have existed in the record. Thus, the information currently before us with respect to switch costs, technical performance, consumer convenience, switch compatibility with other equipment, and use of antennas for off-the-air reception is more than sufficient to support our decision in this proceeding. We note, moreover, that input selector switches have been at issue since Turner's initial petition for rule making to eliminate the former must carry rules and that it was part of the *Quincy* court's findings.

55. *Other Input Selector Switch Issues.* We also are not persuaded by petitioners' arguments that other policy considerations render the input selector switch requirements unworkable as part of the solution to the must carry matter. We continue to disagree with petitioners that consumers will find input selector switches impractical to use. As we indicated in the *Report and Order*, consumers are becoming increasingly accustomed to switching between alternate program input sources, particularly in conjunction with use of VCRs.

56. We also continue to reject Leghorn's proposal to require manufacturers to build input selector switches into new television receivers. In the *Report and Order*, we fully considered this proposal. There we indicated that it is not desirable to require all receivers to be built with a feature intended for use only by cable households. We further recognized that cable subscribers purchasing cable-ready receivers may prefer a more sophisticated external switching device and, thus, may not need built-in switching capability. We concluded that market forces are the most

appropriate means to determine both the number of receivers to be produced with built-in switches and the specific design of those features. We also observe that the desirable features of integral switches described by Leghorn also can be incorporated into switches built-in to video peripheral equipment such as VCRs and cable converter/controllers. Most of these features also can be made part of stand-alone switching devices.

57. We do not find that the input selector switch rules should be modified to permit the exemptions requested by Joint Petitioners, Range, NITC, and Leghorn. Those petitioners generally seek exemptions from the switch requirements in cases where cable systems either choose to carry all available off-the-air signals or are subject to direct competition from one or more other cable systems. Leghorn's proposal to require cable systems to provide external input selector switch requirements for an interim period only where they do not carry all local VHF signals would be particularly undesirable. This proposal would encourage cable systems to carry a fixed complement of broadcast signals (namely the VHF signals) and, thus, would be contrary to our intention that cable operators have the greatest flexibility possible to tailor their program services to meet viewer preferences. As proposed, this solution to the must carry matter would not address in any way The issue of access to the signals of stations other than those VHF stations that would qualify as "local signals." We also reject Adelphia's request that input selector switches not be required for new cable subscribers. We believe that new subscribers are just as likely to have the same misperceptions as existing subscribers. Many "new subscribers" in fact have subscribed previously to cable service while the former must carry rules were in effect.[20] In addition, many

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[20] In this respect, we note that annually, approximately one-third of new cable customers nationwide formerly subscribed to cable service. Remarks of James P. Mooney, President and CEO, NCTA, before the National Press Club, Washington, D.C., January 12, 1987.

first-time subscribers also are likely to have formed the misperception as a result of contacts with existing cable subscribers and from information provided in media sources and cable sales literature. Moreover, we believe it is important during the transition period to make affirmative efforts to encourage the installation and use of input selector switches.

58. *Must Carry Policy.* In the *Report and Order,* we concluded that short-term must carry rules are necessary to ensure that broadcasting remains a competitive alternative source of programming during the transition period. We also recognized that such rules are a stringent form of regulation that intrudes on cable operators' free speech rights. Thus, we found that must carry rules are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers.

59. We are not persuaded by petitioners' arguments that we should alter our decision to adopt interim must carry rules on policy grounds. First, we reject TBS' argument that we did not demonstrate that interim must carry rules are warranted. In the *Report and Order,* we found that there is evidence that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations. In weighing the evidence of cable industry behavior in the absence of must carry rules, we also considered that many cable operators thus far may have been hesitant to act as if there were no such rules pending the outcome of this rule making proceeding. In particular, we observed that NCTA leaders apparently have suggested to members that they continue to carry local signal until this matter is settled.[21] We further determined that cable subscribers

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[21] *See also Report and Order, supra* at n. 159.

generally have not maintained independent off-the-air reception capability and that there is ample evidence that cable penetration nationwide has reached a level such that there is potential for this problem to affect a substantial portion of the population. While it is difficult to provide an accurate forecast of the effects of cable systems' signal carriage practices in the absence of must carry rules on viewer access to program choices, the evidence is sufficient to demonstrate that many cable subscribers may not have access to local broadcast signals during the transition period. Because a significant portion of the viewing public might not have access to broadcast signals, the competitive structure of the video programming industry could be materially harmed in the transition period. Thus, mandatory signal carriage rules are needed to ensure the competitive viability of broadcast television service during the transition to the new competitive environment.

60. Second, we disagree with the position of Joint Petitioners and INTV that continuing must carry requirements are necessary on the ground that the input selector switch and consumer education rules will not achieve their intended objectives. As indicated above, we remain confident that the input selector switch and consumer education aspects of our program are a workable means to ensure that cable subscribers will gain and maintain the awareness of the need for, and have the opportunity to acquire, capability to receive broadcast signals off-the-air. We also remain confident that requiring must carry rules on an interim basis will prevent disruption of the flow of television services to the public and will facilitate an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers will have both the awareness and capability to use switching devices to alternate between cable and broadcast program services.

61. Third, we also reject INTV's and NITC's argument that continuing must carry rules are needed to prevent

disequilibria in the marketplace resulting from other regulatory and statutory factors. In the *Report and Order*, we recognized that these other factors also may tend to distort competition in the video market in a manner that may adversely affect viewers' access to program choices. While we indicated our intention to separately examine these other regulatory and statutory factors,[22] we determined that our action in the signal carriage matter is supportable in its own right based on the evidence in the record of this proceeding. In this regard, the D.C. Circuit in *Committee to Save WEAM v. FCC* found that the Commission may rely on competitive market forces to achieve its public interest objectives even where market imperfections exist.[23] While the compulsory license and the like may prevent ideal market conditions, they do not preclude basic competition in the market; and the latter is all that is needed to justify reliance on market forces.[24] Accordingly, we find no new information or evidence in these petitioners' submissions to alter our conclusion that these factors are separable issues and resolution of the signal carriage matter is not affected thereby. Therefore, we continue to maintain that there is no justification for the long-term intrusion on cable operators' First Amendment rights that would be imposed by continuing signal carriage rules.

62. On the other side of this issue, it would not be desirable to shorten the transition period as argued by

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[22] On February 12, 1987, We initiated two proceedings to address these issues. We adopted a *Notice of Proposed Rule Making* Gen. Docket No. 87-24, FCC 87-65, released April 23, 1987, which proposed to repromulgate some form of syndicated exclusivity rules, to strengthen the network non-duplication rules, and to delete the current non-network program territorial exclusivity rules. We also adopted a *Notice of Inquiry*, Gen. Docket No. 87-25, FCC 87-66, released April 23, 1987, to examine the effects of cable's compulsory copyright license on competition between the cable and broadcast television industries.

[23] 808 F.2d 113, 117 (D.C. Cir. 1986).

[24] *Id.*

CCTA. We believe that our decision to allow for a five year transition period reflects a sound predictive judgment and rational exercise of our broad discretion to engage in regulatory "line drawing" in furtherance of our public interest responsibilities.[25] As indicated in the *Report and Order*, we determined that a five year transition period is necessary not simply to provide consumers with sufficient time to become aware of the need for independent access to off-the-air broadcast signals, but also to acquire or reacquire such capability if they so desire by installing indoor or outdoor antennas. Further, this period is necessary not only to educate consumers about the need for input selector devices, but also to provide sufficient time for the design, development, and marketing of equipment that will provide consumers with a continuing and effective off-the-air access capability.

63. Finally, for the reasons we indicated in the *Report and Order*, we continue to reject UCC's proposal for new must carry rules that restrict carriage rights to only those "significant local stations" that are "in need" of carriage.[26] There, we found that UCC's proposal was not only unsuited to the current need for must carry rules during the transition, but also that it would, in fact, hinder rather than promote viewer access to program choices in the interim period! We observe that UCC's resubmission of its earlier proposal in this proceeding is predicated on its assertion that we improperly defined the federal interest in this matter. As we indicated in the *Report and Order*, and reiterate here, "[o]ur objective in adopting these rules is neither to penalize nor to benefit any particular station," but rather "to temper, during an interim period, potential threats to the program source diversity provided by the

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[25] *See generally FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1977).

[26] *See Report and Order*, *supra* at paragraph 177.

system of broadcasting."[27] Inasmuch as we find that argument incorrect, as discussed above, we need not further address UCC's request.

64. *Constitutional and Statutory Issues.* After reviewing the relevant Federal case law, we determined in the *Report and Order* that intrusions on the First Amendment rights of cable operators are subject to a more stringent standard of review than that currently applied to broadcasters, that the interim must carry rules could properly be classified as content-neutral and that, using the standard for analyzing the propriety of content-neutral regulations, the rules furthered the substantial federal interest of maximizing the viewing choices available to consumers and were narrowly tailored to meet that objective. A number of petitioners now maintain that our determination of the must carry regulations' content-neutrality was incorrect, and make various arguments against our use or application of the *O'Brien* standard[28] to evaluate the constitutionality of the overall must carry program. Petitioners further claim that the input selector switch requirement is fatally overbroad, that the five-year sunset provision does not sufficiently limit the rules' intrusions on cable operators' First Amendment rights, and that the consumer education component of our overall plan unconstitutionally compels cable operators to speak and to advertise their broadcast competitors. We will address these arguments in turn.

65. Several petitioners address our application of *O'Brien* in the *Report and Order* and the content-neutrality of the interim must carry rules. TBS claims that the interim must carry rules constitute a prior restraint on protected speech under the First Amendment because the

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[27] *Report and Order, supra* at paragraph 198.

[28] Generally, under *O'Brien* and subsequent cases, a government regulation that imposes an incidental burden on speech will be upheld if it advances a substantial governmental interest and is narrowly tailored to further that interest. *Report and Order, supra,* at 894.

rules act to preclude cable operators' programming selections, compel cable operators to make particular signal substitutions, and impose sanctions for refusals to comply. Consequently, TBS states, the *O'Brien* test is inappropriate to judge the constitutionality of the rules, and stricter constitutional analysis should be applied. Century and Leghorn maintain essentially that the interim rules are not content-neutral because they improperly interfere with the protected editorial discretion of cable operators by designating classes and preferences of speakers and by forcing operators to carry signals which they otherwise may not choose to program.

66. We reject the suggestion that these rules should not be considered as content-neutral for purposes of constitutional analysis. The interim must carry rules require only that for a limited time, cable systems must devote a limited portion of their channel capacity to carriage of broadcast signals available off-the-air in their community. As we stated in the *Report and Order*, the interim rules make that determination based not on the content of those signals, but on criteria wholly unrelated to their content—namely, their proximity to the cable headend and the extent to which they are viewed. Moreover, they do not forbid dissemination of any particular signal or signals. Where, as here, The primary purpose of a regulation is not the promotion or suppression of particular viewpoints, the regulation in question is considered to be content-neutral.[29] The interim rules are intended to further the maximization of viewer choice, "not . . . to prefer broadcast viewpoints over those of cable operators or program-

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[29] In contrast, the use of prior restraint analysis to determine the constitutionally of a government regulation is appropriate only when the restriction imposed by the regulation in question is content-based. Prior restraint of a speaker seeks to prevent the dissemination of some *particular* viewpoint. *See e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

mers."[30] Consequently, the rules are content-neutral for purposes of constitutional evaluation; the use of the *O'Brien* standard for evaluating content-neutral regulations is therefore fitting in this context.[31]

67. The arguments of all three petitioners implicitly assert that the content-neutral test itself is flawed because the indirect effects of those rules upon programming judgments should not be considered an incidental burden on speech. This is a conclusion we are not empowered to reach; this Commission will not second-guess the Supreme Court on the formulation of constitutional tests and standards. TBS Century and Leghorn all intimate that any attenuation of cable operators' programming discretion, no matter how indirect, is presumptively invalid—a thesis which our review of the pertinent case law belies.[32] The interim must carry rules are "consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.' "[33] Therefore, petitioners' arguments must fail.

68. Adelphia and TBS argue that we have failed to demonstrate a substantial federal interest to justify the new rules. In this regard, they claim that we have failed to

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[30] *Report and Order*, *supra* at 893.

[31] Carriage of noncommercial educational television stations during the transitional period is required to further the uniquely important Federal interest in ensuring continued access to programming "that is not subject to the same market forces as commercial broadcast and cable television." *Report and Order*, *supra* at 879.

[32] We note that even in assessing the constitutional implications of regulations affecting newspapers, the First Amendment does not "necessarily bar[ ] every regulation which in any way affects what the newspapers publish." *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969). *See also Associated Press v. U.S.*, 326 U.S. 1 (1945).

[33] *Renton*, *supra* n. 7, at 929 (quoting *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Board of Pharmacy)*, 425 U.S. 748, 771 (1976) (emphasis added)).

amass a sufficient evidentiary basis to substantiate the existence of the problems which justify further must carry regulation and our conclusion that input selector switches will assist in maximizing consumer viewing choices. However, our decision in those respects has been reached after weighing the voluminous comments and studies submitted in this proceeding, our own studies on the changing system for providing television service in this country and The evolving role of cable television in that system, and various congressional determinations and amendments to the Communications Act encouraging diversity of programming and competition in the cable television industry. We further observed that, due to "the rapidly evolving nature of the cable industry and changing competitive incentives resulting from the continuing development of satellite programming services carried by cable systems and other factors . . ." it is not clear that timely studies could be performed to obtain an accurate forecast of the actual effect of abandoning must carry rules.[34]

69. Therefore, our decision to implement the input selector switch requirements and interim must carry rules was based on the consideration of all available evidence combined with our special expertise in this field of regulation, a combination that we found was ample to demonstrate the substantial Federal interest at stake and how our solution to the must carry matter best furthers that interest. We concluded, and still believe, that our long-term goal of maximizing viewer choice can be achieved only after correcting consumers' misperceptions that cable systems will carry all available off-the-air signals and that the only available means to view broadcasting signals is through their cable systems, and after providing subscribers with the opportunity to obtain the hardware to switch

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[34] *Report and Order, supra* at 894, n. 159.

between off-the-air and cable program sources.[35] We also concluded that it is necessary to provide interim must carry relief to the broadcast television industry for a time to ensure that it remains a competitive alternative source of programming as we move to an environment without must carry rules. Consequently, a must carry program limited in duration and less intrusive on cable operators than the former rules remains necessary to ensure that cable subscribers retain access to off-air signals during the transitional period after the input selector switch rules take effect.

70. Adelphia and TBS also claim that we failed to demonstrate that the new rules are the least burdensome alternative on cable operators to achieve any substantial federal interest. We do not disagree with the proposition, both as a matter of sound economic regulatory policy and of constitutional doctrine, That we should seek the least burdensome alternative, and we have attempted to fashion rules adequate to the task at hand with that objective in mind. However, in our judgment, petitioners' argument reveals a misunderstanding of the applicable test for establishing the constitutionality of the interim rules. The proper standard for review was recently expressed thus by the Supreme Court:

> [R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial governmental inter-

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[35] TBS' argument that switches are not necessary because most cable operators have not dropped local broadcast signals is not persuasive. Moreover, because our interest is in ensuring *maximum* program choices, even the dropping of one two signals frustrates that objective if the owner does not have the knowledge or equipment to obtain these signals directly off-the-air.

est that would be achieved less effectively absent the regulation.[36]

Moreover, we are afforded a broad degree of discretion in crafting rules to accomplish our public interest objectives[37]

71. We concluded in the *Report and Order* that the interim must carry rules are narrowly tailored to meet our objectives, and that the burden on cable operators' speech imposed thereby is no greater than necessary to ensure that program source diversity in broadcasting is not threatened during the transition to a video marketplace without must carry rules. We noted that the interim rules avoid overbreadth and undue burdens on cable operators by exempting cable systems with capacities of 20 channels or less, by providing for absolute limitations on the number of stations a non-exempt system is required to carry, by narrowing the criteria for a broadcasting signal to be qualified for must carry status, and by restricting the duration of the rules to a five-year period. The rules further ensure that local broadcast signals will be available to all subscribers by requiring their availability on the lowest priced tier. We believe that the refinements we are making to both the interim must carry rules and the input selector switch and consumer education requirements, as described below, further ensure that our two-part program is properly tailored and thus constitutionally permissible.[38]

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[36] *Albertini, supra* n. 12, at 2907 (citations omitted). *See also Arcara v. Cloud Books, Inc.*, 54 U.S.L.W. 5060, 106 S.Ct. 3172, 3175 (1986).

[37] *See Quincy, supra* at 1459; *see also White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1519 (D.C. Cir. 1984).

[38] Adelphia argues that the input selector switch requirements are overboard for three reasons: 1) they fail to provide an exemption in cases where an input selector switch would serve no purpose (for example, in situations where all local VHF broadcast stations are carried on a local cable system or where no local VHF signals are receivable off-air in the cable system area); 2) they should not be applied to new

72. While Adelphia and TBS urge us to adopt a solution which is less intrusive on cable operators' First Amendment rights, specifically, the immediate elimination of all must carry requirements, we are not persuaded that there is an alternative that would meet the need to preserve cable subscribers' access to off-the-air broadcast programming during the transition period. That is, because of the perception caused by our former rules' requirement that all local broadcast signals be carried on cable, subscribers will lack both the awareness and capability in the short run to access broadcast signals that are not carried by cable. Although the awareness should be gained once the consumer education programs begin, as described below, it is our best judgment that a five year period is needed to permit subscribers to regain the capability—by installing both switches and antennae. Therefore, we continue to believe that our solution to the must carry matter is the most appropriate and effective means of ensuring that the public interest is served.

73. CCTA claims that the five-year sunset provision for the interim must carry rules does not cure their constitutional infirmity. It cites *Century Federal* to support its proposition that abridgement of cable operators' First Amendment rights is not permissible merely because it is of limited duration. CCTA urges us to select a shorter sunset period of no longer than one year for the interim rules, and declares that the record in this proceeding does not indicate that a five year period is the most appropriate to accomplish the Commission's goals.

74. Initially, we note that *Century Federal* is readily distinguishable from the instant situation. That case in-

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subscribers, since only previously existing subscribers would suffer from the misperception that local broadcast signals cannot still be received through external antennas; and, 3) they should not be mandatory, but rather optional. *See* para. 16, *supra*. We believe these arguments are resolved by our modifications to the input selector switch requirements, detailed below at paras. 78-83.

volved a potential cable operator's First Amendment challenge to Palo Alto, California's use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to the facilities necessary to install cables within the city. In granting a motion for partial summary judgment, the district court held that the insignificant (if any) disruption to the public domain caused by the installation of more than one cable system does not constitute a substantial or important governmental interest so as to warrant suppression of all cable speakers save one, and that even if the cable television market in a particular area is a natural monopoly, no justification exists for greater governmental regulation of cable operators than is otherwise permitted under the First Amendment.[39] In contrast, the must carry matter involves not the total suppression of a speaker to promote a governmental interest of uncertain value, but an incidental burden on a speaker's First Amendment rights for a limited period of time to further the substantial governmental interest in maximizing viewer choice.

75. The propriety of a given time period to accomplish our objectives in making the transition to a regulatory environment free of mandatory signal carriage restrictions is, of course, something that cannot be quantified through empirical analysis.[40] The five-year sunset period was selected because, in our judgment, it is the most reasonable time period in which to impose limited mandatory carriage while ensuring that the consumer education program is completed and cable subscribers have an opportunity to reestablish independent access to off-the-air broadcast television service. We believe that, after that time, the marketplace can be relied upon to maximize program choices for the nation. The five-year period also will allow us an

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[39] *Century Federal, supra* n. 8.

[40] Significantly, we observe that CCTA does not suggest any method by which this might be accomplished.

ample opportunity to observe the transitional cable and broadcast marketplace for purposes of our prospective rule making to determine whether mandatory carriage should continue to be required in particular instances beyond the sunset of the interim rules. Consequently, for all these reasons, we continue to believe that the five-year sunset period is necessary and appropriate.

76. Texas Cable and Leghorn criticize the consumer education requirement of our two-part regulatory program as adopted in the *Report and Order*, claiming that it is unconstitutional because it compels cable operators to advertise the existence of their competitors and coerces cable operators to spread a message with which the operators may disagree. Texas Cable likens the consumer education requirement to the kind of required "consumer interest" message recently struck down by the Supreme Court in *Pacific Gas*. Leghorn contends that case supports his position because the Court there agreed with the utility's contention that it had a First Amendment right not to be required to use its own property to help spread a message with which it disagrees.

77. Petitioners' arguments misconstrue the purpose and function of the consumer education requirements. The requirements as modified below direct only that cable operators list Television stations that may be available off-the-air in the community that are not carried on their cable systems at the time the listing is provided, and give general guidelines as to the information to be provided to subscribers about the input selector switch requirements and the carriage of local television stations. A regulated entity may be required to provide certain information to protect substantial or important interests of its customers. For example, Section 631 of the Cable Act[41] requires cable operators to inform subscribers in writing of the nature,

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[41] 47 U.S.C. §551.

etc., of personally identifiable information collected or to be collected about them and the possible uses of that information. The consumer education information requirements at issue here, including the identification of uncarried signals, similarly further the public interest by educating consumers about changes in the video marketplace that affect their ability to receive programming. We believe that this requirement can be imposed under Sections 2(a), 4(i), and 303(r) of the Act to advance the important federal interest in maximizing program choices.[42] We also note that the consumer education requirement fosters Section 307(b) objectives by facilitating access to off-the-air television. However, the guidelines do not require operators to provide any further information or inducement that solicits subscribers to actually *view* the video "competition", *e.g.*, a description of the general format or programming of the uncarried television station or stations to interest subscribers in switching to their off-the-air capability to watch programs carried on that signal. Without such an inducement, we do not believe that the mere identification of uncarried television stations as part and parcel of our overall program of educating video consumers about the changes in the signal carriage rules and their possible need for input selector switches constitutes "advertising" of those stations.[43] While the Supreme Court, in *Central*

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[42] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *see also Report and Order* in CC Docket No. 81-893, 95 FCC 2d 1276, 1293-94 (1983).

[43] For example, Leghorn, in characterizing the consumer education program as "advertising," states that "Broadcasting already devote considerable promotional effort to identifying their video fare." However, our program requires only the identification of a signal, not information about any programming carried on that signal. Video consumers are induced to view a station because of desirable *programming*, not because they are informed that a station operates on a particular channel. These petitioners also neglect to note a crucial difference between the consumer education program and "advertising"—namely, that we are requiring dissemination of this information only

Hudson Gas & Elec. Corp. v. Public Service Commission of New York (Central Hudson),[44] recognized the need to protect commercial speech due to the importance of the information function of advertising, it does not follow that any or all information required to be provided by a regulated entity regarding changes in rules and obligations which affect service to its customers constitutes advertising *per se.*[45] In any event, "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . [the] constitutionally protected interest in *not* providing any particular factual information in [a business"] advertising is minimal."[46]

78. Insofar as a purely informational requirement like the one adopted in this proceeding is entitled to First Amendment protection,[47] it is well settled that restrictions that incidentally burden speech are justified if the regulation is content-neutral, serves a substantial governmental interest and is not more extensive than necessary to further that interest.[48] Equally permissible are restrictions on

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to their business customers, not to the public at large. In addition, we note that the Commission has imposed similar disclosure requirements in the common carrier area. *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment*, 95 FCC 2d 1117, 1143 (1983).

[44] 447 U.S. 557, 563 (1980).

[45] *Pacific Gas, supra* at 908, n. 9, is inapposite in this regard, since the "speech" involved there was a utility's newsletter that "extend[ed] well beyond speech that proposes a commercial transaction." The Court clearly distinguished applicable law relating to disclosure requirements by businesses. *Id.* at n. 12.

[46] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 2285 (1985).

[47] Even commercial speech consisting of purely factual matter without an advertising component is entitled to a measure of First Amendment protection. *Virginia Board of Pharmacy, supra* n. 24, at 762.

[48] *See Friedman v. Rogers*, 440 U.S. 1 (1979).

false, misleading or deceptive commercial speech.[49] Moreover, we note that "disclosure" requirements for commercial speech are not subject to "a strict 'least restrictive means' analysis. . . ."[50] We believe that the guidelines as to the information which must be provided to consumers are a permissible, minimally intrusive form of directing the manner in which that information is presented and of assuring that consumers are not misled or deceived about the function of the input selector switch requirement and the meaning of and impact which the interim must carry rules and their expiration may have on their viewing choices and habits. In reaching this conclusion, it is important to point out what the consumer education requirements do *not* mandate. We are not attempting to confine or limit the commercial expression of cable operators on particular issues.[51] or to particular language in describing features and effects of the new rules, but, rather, we seek to provide only a measure of accuracy with regard to commercial information disseminated in one area—that of the general requirements and possible effects of our two-part regulatory program. Similarly, we do not attempt to circumscribe what may be said about the two-part program, but only require, in the interest of educating video consumers who are cable subscribers, a minimum of information about how our new regulations may affect their ability to receive local television signals. Consequently, these information requirements are narrowly tailored to serve the important commercial speech objective of "assist[ing] consumers and further[ing] The societal interest in the fullest possible dissemination of information,"[52] dur-

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[49] *See Virginia Board of Pharmacy, supra* n. 24, at 771-772.

[50] *Zauderer, supra* at 2282, n. 14.

[51] *Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[52] *Central Hudson, supra* n. 32, at 561-562.

ing the transitional period to a video marketplace free of mandatory carriage requirements.[53]

79. Finally, we believe that the substantial modifications to the input selector switch requirements we are making herein will resolve Adelphia's concerns that the input selector switch requirements adopted in the *Report and Order* contravene Sections 622 and 623 of the Cable Act. The revised switch requirements will not restrict the amount cable systems may charge for services and/or equipment. Further, neither the input selector switch requirements nor the interim must carry rules impose any new requirement regarding the content of cable services as addressed by Section 624 of the Cable Act. As we noted in the *Report and Order*, we believe that the specific reference to the former must carry rules by the House Report

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[53] Texas Cable claims that the consumer education program also is inconsistent with our decisions to eliminate various policies regarding trade practices of broadcasters under our "underbrush" proceedings and with our 1985 finding that the fairness doctrine is contrary to the public interest. We observe that the underbrush decisions eliminated policies that often were not under this Commission's areas of expertise and/or were duplicative of other policies. Where alternative remedies or market forces would serve to deter an undesired practice, we eliminated the policy in question. *See e.g., Elimination of Unnecessary Broadcast Regulation*, 57 RR 2d 913 (1985), *recon. denied*, 58 RR 2d 864 (1985), *aff'd sub nom. Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986). In contrast, as we have determined in this proceeding, the must carry matter requires our intervention to assure that the information disseminated to subscribers is consistent with implementation of the rules and policies adopted herein. Moreover, we find no correlation between the informational requirement here and rules that we have raised questions about relating to regulatory oversight of the correct balance of coverage of particular kinds of issues by broadcasters. The latter concerns not factual "disclosure requirements for business corporations," *Pacific Gas and Electric*, 106 S.Ct. at 911, n.12, but speech regarding matters of public concern, which is entitled to the highest degree of encouragement and protection. *See 1985 Fairness Report*, 102 FCC 2d 143, 149-50 (1985).

on the Cable Act[54] expresses Congress' intention that we had, and continue to have, the authority to promulgate regulations to further the substantial Federal interests at issue in this proceeding, including the authority to use must carry rules and to amend them if necessary.[55] Consequently, the adoption of interim rules is well within our discretion under the Cable Act and, moreover, does not constitute a "new" addition to the content of cable services within the meaning of Section 624 of the Act.[56] On the contrary, the new rules require considerably less to be carried than the former rules.

Basic Policy Rule Modifications

80. While we remain confident that the basic elements of our regulatory program are practically, technically and legally feasible means for achieving our policy objectives, we find that certain features of that program should be modified to accomplish better those objectives. In particular, the input selector switch rules, as adopted, may impose burdens on cable operators that are greater than necessary to correct the viewer misperception problem and also may tend to limit cable operators' and consumers' flexibility to choose switching equipment appropriate to their specific circumstances. Also, the consumer education requirements may not provide cable operators sufficient

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[54] "Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements." H.R.Rep. No. 934, 98th Congress, 2d Sess. at 70 (1984).

[55] *Report and Order* at 896. In this connection, we observe again that the *Quincy* court ruled only that The must carry requirements at issue there were unconstitutional, and expressly reserved judgment on the question of whether any must carry requirements could pass constitutional muster.

[56] The fact that the *Quincy* court vacated the rules does not alter this conclusion. Section 624(f)(2)(A) of the Cable Act prohibits only the adoption of new content regulations not in effect on September 21, 1983. The must carry rules were undisputably in effect on that date.

flexibility to tailor their information programs to their systems' circumstances. Finally, some aspects of our program require clarification.

81. In considering petitioners' statements with respect to input selector switch costs, we recognize that the rules as adopted may impose substantial financial burdens on cable operators. These rules not only would require cable systems to bear all of the costs associated with equipment and installation for new subscribers, but also would require them to provide switches in cases where subscribers might not want them. We also note petitioners' point that the rules would require switches to be provided in areas where there are no broadcast signals available off-the-air, such that the switches would serve no useful purpose.

82. In addition, upon further reflection on this issue, we find that the rules tend to limit incentives and flexibility for cable operators to provide a range of switching equipment to meet varying subscriber preferences and to ensure better switch compatibility with video peripheral equipment, such as VCRs, and specific video equipment features. By requiring that switches be provided at no charge or at cost, the rules reduce cable operators' economic incentives to offer switch options with premium features, such as electronic operation or remote control capability, or to offer upgraded terminal/converter devices that include built-in switches. Subscribers will be more likely to maintain and use independent off-the-air reception capability if the associated input selector devices are compatible with their needs and otherwise convenient to use. Moreover, the record demonstrates that there are other advantages to the more expensive electronic switches, including longer lifespan and better isolation. Obviously, cable operators may not desire to provide these switches free of charge.

83. In view of these considerations, we are adopting substantial revisions to the input selector switch require-

ments that are generally consistent with the approach suggested by CCTA. Under the revised rules, cable systems will be required to offer switches to new and existing subscribers, but will be permitted in all cases to charge for the purchase or lease of switches and associated hardware. In addition, cable systems will be permitted to charge for installation of switches for existing subscribers. There will be no "at cost" restriction on pricing of either the equipment or its installation for existing subscribers. However, cable systems will not be permitted to charge an additional fee strictly for installation of switches for new subscribers. We believe the incremental labor necessary to include a switch along with installation of other equipment for new subscribers is minimal and that to provide installation at no additional charge will assist in encouraging new subscribers to acquire a switch. Cable systems will be required to make an affirmative switch offer to their subscribers in accordance with our original plan; however, the rules also will include language to clarify that subscribers may decline the switch offer and are not otherwise obligated to install or maintain off-the-air reception capability. Also, we wish to clarify that consumers may use switches and associated hardware obtained from sources other than their cable system. We believe this will provide a proper competitive balance in the marketing of input selector equipment to limit the price of switches. We are making these changes in order to encourage flexibility in the range of switch options available to subscribers, so that we do not inadvertently encourage use only of the non-state-of-the-art mechanical "A/B" switch, and in order to greatly reduce the financial burden imposed on cable operators. By this change, not only will cable operators not be responsible for bearing the costs of switches and their installation, but they will not be required to provide switches To subscribers who do not need them, for example, because their reception of off-the-air signals is weak or non-existent.

84. We agree with petitioners who argue that there is no need to require input selector switches or consumer education in areas where there are no broadcast signals available off-the-air. Accordingly, we will exempt cable systems that are located in such areas from any requirements under the rules adopted in this proceeding. The most reliable general indicators of whether a broadcast station's signal is generally available off-the-air in a particular area are its Grade B predicted contour and whether it is "significantly viewed" in the cable community.[57] These are the indicators of available off-the-air signals we adopted for use in determining whether cable systems are subject to effective competition for basic service as part of our implementation of the Cable Communications Policy Act of 1984 in MM Docket No. 84-1296.[58] These two indicators are also appropriate for use in determining signal availability for purposes of the exemption from the switch and consumer education rules. The Grade B contour of a station is the standard relied on to determine expected service areas. Also, we recognize that in many cases, a television station's signal may be viewable off-the-air at distances beyond its Grade B contour. In the latter case, reception of the station's signals is generally less reliable with ordinary roof-top antennas and may require special equipment. Areas beyond a station's Grade B contour where its signal is available with ordinary equipment or where the population has tended to install Special antennas and other equipment necessary to ensure reliable reception can

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[57] As defined in Section 76.5(k) of our rules, a station is significantly viewed if its audience in noncable households meets or exceeds the following levels: 1) for full or Partial network affiliated station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and, 2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. *See* 47 CFR §§76.5(k) and 76.54.

[58] *See Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985).

be identified by whether the station is significantly viewed in the area. Thus, the rules will exempt any cable system serving a community where no portion of that community is within the predicted Grade B contour of at least one full service broadcast television station or a noncommercial educational translator station eligible for must carry status and no such stations are significantly viewed in the county in which the cable community is located.

85. There also may be situations where the Grade B contour of one or more broadcast stations overlaps all or a portion or the cable community, yet the signals will not be viewable in that area due to terrain shielding or other factors. In such instances, the cable system operator may submit showings and engineering studies that the signals are not available anywhere within the cable community. Such submissions shall include studies made in accordance with Section 73.686 of our rules.[59]86. We also recognize that there may be instances where a new broadcast station, existing broadcast station with newly upgraded facilities, or existing station that becomes significantly viewed will provide service to a community served by a cable system previously exempt from the rules. Where such a situation occurs prior to the expiration of the five-year transition period, the cable system at that time will be required to comply with all aspects of the rules as adopted in this proceeding. Where such a situation occurs subsequent to the expiration of the transition period, the cable system will be required to comply only with the consumer education rules that continue beyond the five year period.

87. We also acknowledge the concern expressed by some petitioners that the available supply of input selector switches may not be adequate to enable cable operators to begin providing switches to new subscribers within 30 days of the release of the instant decision, when the rules

[59] *See* 47 CFR §73.686.

would become effective, as stated in the *Order* staying their effective date.[60] We recognize that the production and distribution systems for supplying input selector switches and associated equipment may need some time to catch up to the increased demand for this equipment and to meet the switch technical standards to be adopted pursuant to the proceeding will initiate shortly as discussed below. Additional time also would enable cable operators to more fully plan their activities for complying with the new rules. Accordingly, the requirement for offering switches to new subscribers will be delayed for six months after the effective date of these rules in the same manner as the requirement for offering switches to existing subscribers. However, cable operators will be required to inform new subscribes at the time of installation of service of the need to maintain off-the-air reception capability and to provide the other information required by the consumer education requirements immediately upon the effective date of the rules.

88. In considering the signal leakage issue discussed above, we recognize that there may be some cases where consumers install switches improperly or switches fail and signal leakage results. Cable systems will be responsible for detecting and eliminating signal leakage in excess of the standards set forth in Sections 76.605 and, after its July 1, 1990 effective date, 76.611 of our rules resulting from input selector switches regardless of whether the switches are owned or installed by subscribes. Cable systems already are required to conduct systematic performance checks of their facilities under Section 76.601 and, thus, this requirement will not substantially alter the regulatory burden on able operators. Moreover, the typical cable subscriber does not have the technical expertise or equipment to detect signal leakage. We also recognize the importance to life and safety of preventing signal leakage

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[60] *See Order supra* at n. 3.

on the aeronautical frequencies and that in general cable systems will be the only entities qualified and equipped to detect Such signal leakage. Cable operators' responsibility in this regard will be limited to the minimum necessary to detect and eliminate signal leakage in excess of that permitted under the rules. In cases where such leakage occurs, cable operators will be required only to disconnect or, if ultimately necessary, discontinue service to the subscriber until the leakage problem is corrected. Cable operators will not be restricted from charging for services and hardware associated with correction of switch leakage, including the replacement, repair, or proper installation of the switching equipment.

89. As indicated above, we do not want the revised switch requirements to provide cable systems with economic advantages that might permit them to charge excessive prices for switches and installation or otherwise to be less attentive to consumer needs in this area. As an additional measure to limit this advantage, it is necessary to include provisions in the consumer education rules to require cable systems to include as part of their program a statement that switches may be obtained from other suppliers. Cable systems also will be required to indicate that there are a range of possible switch options, including, for example, simple cable/broadcast manual, multiple source input switches, electronic switches, remote control switches, and receivers with built-in switching functions. They will further be required to state that the list of switch options indicted is only representative of those that may be offered and that other options also may be available.

90. In view of the importance of consumer education to the achievement of our goal of correcting viewers' misperceptions about the need for independent access to off-the-air broadcast signals, we plan to maintain the consumer education program as a continuing requirement beyond the five-year transition period. However, we recognize that this requirement imposes some burden on cable op-

erators. Therefore, we would expect to revisit the need for continuing the consumer education requirement as part of the proceeding announced in the *Report and Order* and which we plan to complete prior to the expiration of the transition period, to determine whether there are particular situations where must carry rules might continue to be necessary.

91. We believe this revised approach effectively will eliminate the major portion of the financial burden imposed on cable operators by our original decision. It also will eliminate the requirement for switches to be provided in situations where they would not be used. In addition, the revised switch requirements will provide cable operators with the incentives and flexibility to offer a wider range of switch options to meet varying consumer needs. These rule modifications will not compromise our objectives To change consumers' misperception of the need for maintaining access to off-the-air broadcast signals and to assist consumers in obtaining or reestablishing that access. Our objective of correcting this misperception will be achieved so long as consumers are made aware of the need for independent access to broadcast signals through the consumer education program, are provided an affirmative opportunity to obtain a switch, and are provided sufficient time to reinstall an antenna if they so wish. Our revised approach in fact will enhance the effectiveness of our overall program by aligning it more closely with the reality of market forces. In this respect, the revised rules will rely on market forces, as represented by consumer decisions on whether to obtain a switch and the type of switching equipment they need or prefer, to determine both the pattern of switch penetration and the type of equipment that is used.

TECHNICAL STANDARDS FOR INPUT SELECTOR SWITCHES

92. Gill Industries, Inc. (Gill), operator of a cable system with dual cables utilizing A/B switches for cable selection argues that we should adopt specific technical standards for input selector switches. Gill submitted the results of a study completed on December 30, 1986, wherein the interference effects of A/B switches were examined. Gill examined switches in both subscribers' homes and in the lab. It states that using switches to connect antennas to its system in many cases caused noticeable, objectionable interference to the reception of cable signals by subscribers and to the reception of off-the-air TV signals by non-subscribers. Gill further states that use of antenna/cable input selector switches will probably cause signal leaks which will raise its cumulative leakage index above the limits established by Section 76.611 of the Commission's Rules. Finally, Gill submits that in homes equipped with outdoor antennas, the antenna/switch isolation must be at least 80 dB to avoid individual leaks that will exceed the 20 uV/m standard for cable systems imposed under Section 76.605(a)(12) of the Rules. It states that by its tests, it found that in approximately 50 percent of its installations the addition of a switch and antenna will result in only 45-50 dB of isolation. Gill claims that its tests demonstrate that the input selector switch rules as now structured will result in significant signal reradiation, which is incompatible with the maintenance of a clean Rf environment for off-the-air TV reception, and with the Commission's policy of protecting aeronautical navigation and communications frequencies.

93. Gill therefore requests that the commission modify its input selector switch rules to: 1) require all equipment connected to a cable system to meet the signal leakage limits now in the Commission's Rules; 2) require, in the case of new subscribers, that cable operators connect an

input selector switch to the cable system and to an off-the-air antenna, with the subscriber's consent, at cost, using equipment that meets Part 76 standards; 3) require all input selector switches and their connections to meet an 80 dB isolation standard; 4) permit only coaxial antenna cable to be used in the case of rooftop antennas; 5) permit use of only "rabbit-ear" antennas with coaxial cable downleds, given their relative radiating inefficiencies and the short length of the connecting wire; and, 6) permit cable operators to install input selector switches in the homes of existing subscribers who request a switch, at reasonable cost, using equipment that meets Part 76 standards.

94. We continue to believe that the technical standards applied to TV interface device transfer switches as set forth in Section 15,606 of the Rules are sufficient to ensure that properly connected input selector switches do not cause interference to cable or off-the-air reception or otherwise permit harmful signal leakage.[61] These standards were established in earlier Commission proceedings[62] and, in view of the fact that no interference complaints have been filed with this Commission that have been lined to switching devices, the existing standards appear to be sufficient to provide the level of isolation necessary to protect against interference. However, we recognize the concerns expressed by Gill and others in this proceeding for possible interference, particularly on the aeronautical communications and navigation frequencies, that might result from use of switches that are inadequate to prevent significant signal reradiation. We find that the important nature of this issue warrants the provision of additional opportunity for interested parties to comment and to submit evidence. Accordingly, we will issue a separate Notice of Proposed Rule Making to consider standards for input selector

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[61] 47 CFR §15.606.

[62] *See Report and Order* in Docket No. 19281, 38 FCC 2d 430 (1972).

switches used to alternate between cable and broadcast television service. This new proceeding will be limited to issues associated with technical standards for broadcast/cable input selector switches. We intend to complete this proceeding in an expeditious manner in order that manufacturers will be able to supply switches in accordance with the scheduled implementation of the new rules as set forth herein. Consistent with this action, we vacate the new Section 76.66(b) adopted in the *Report and Order* which would have required that all switches used to select between broadcast and cable service comply with the technical standards of Section 15.606(a) of the rules.

REVISIONS TO THE CONSUMER EDUCATION REQUIREMENTS

95. In their joint supplemental petition, NCTA and CATA request that the Commission revise the information statement requirement now set forth in Section 76.66(c) of the Rules. This rule section prescribes the consumer education information that cable operators are required to provide to new subscribers at the time of installation, and to all subscribers on an annual basis. Under the new rules, as adopted in the *Report and Order,* this information statement must consist of a brief, general description of the Commission's signal carriage rules and the purpose of input selector switching devices, followed by a list of the local broadcast stations not carried by the system and the name and telephone number of a contact person representing the system. NCTA and CATA specifically object to the requirement that all local broadcast stations not carried by the system be contained in the information statement. NCTA and CATA state that the term "local broadcast station" is nowhere defined and will cause uncertainty among system operators about which stations are to be included. Additionally, any such list, NCTA and CATA maintain, will inevitably be overinclusive, underinclusive, or both, due to the locations of particular sub-

scribers and changes in the list during the year due to stations signing on-the-air or going dark. NCTA and CATA also object to the inclusion of specific suggested wording for the consumer education program as "regulatory micromanagement" virtually certain to cause confusion among operator and their subscribers. In place of the current requirement, these petitioners suggest that systems merely be required to supply their subscribers with general information about the Commission's rules and the availability of broadcast signals over the air. Specifically, systems would be required to notify their subscribers that: 1) under Federal regulations, the system must carry a certain number of local broadcast signals; 2) systems may choose to carry additional broadcast signals; 3) there maybe other local broadcast stations not carried by the system that could be received off-the-air with appropriate equipment; 4) 'appropriate equipment' may include an off-the-air antenna and/or an input selector switch; 5) in the event of an equipment outage, antennas and switches also can be used to receive some or all of the broadcast stations carried on the system; and, 6) more information on the availability of off-the-air reception to a particular location can be obtained from a television station, an antenna supplier, or an electronics store.

96. Spanish International Communications Corp. and Spanish International Network (SICC) generally applaud the Commission's consumer education program. SICC believes that this approach satisfies the interests of consumers, safeguards the First Amendment rights of cable operators, and ultimately will work to maximize viewer choice through the workings of the marketplace. However, SICC observes that consumer education is only as successful as the ability of consumers to understand the information being disseminated. Therefore, SICC urges the Commission to require cable systems to provide consumer education notices in English and in a foreign language in communities with sizeable foreign-language speaking pop-

ulations. As a means of determining whether such a population exists, the Commission should look to the existence of a full-time foreign language television station. To ease the administrative burden, cable systems could rely on the local foreign language station to provide accurate translations of the consumer education notice, and SICC thinks the Commission should encourage dialogue between cable operators and television station managers to facilitate this effort.

97. In view of the changes we are making with respect to the basic provisions of our policy as discussed above, it is necessary to make a number of changes in the consumer education requirements. We agree, moreover, with NCTA and CATA that the current specification of the consumer information requirements in the form of specific suggested language in the rules may inhibit a cable system's understanding as to the flexibility in presenting the required information in the manner that best suits its particular situation. Accordingly, we are revising the rules to state the consumer education requirements in general terms.

98. However, we are not persuaded that we should eliminate the requirement for cable systems to identify available off-the-air full service station signals that they do not carry. Such identification is necessary for consumers to know which signals they will need to access off-the-air. In examining this requirement, we find that certain clarifications are necessary. We recognize that the rules, as adopted, did not define "local broadcast" for this purpose. It is our intention that subscribers be made aware of all signals that *may* be available to them off-the-air but are not carried on their cable service. This is consistent with our stated goal of maximizing viewer access to program services. We believe that criteria to be used in determining off-the-air signal availability for exemption from the two-part program requirements, i.e., predicted Grade B contour and significantly viewed, also are appropriate for de-

termining signals that may be available for purposes of the consumer education program. Accordingly, cable systems will be required to list those broadcast stations they do not carry whose predicted Grade B contours overlap any portion of the cable community or are significantly viewed in the county. Cable systems will not be required to notify subscribers of changes that occur throughout the year in the stations that maybe available off-the-air and not carried. Rather, the identification of such stations will be part of the annual consumer education requirement and will be required to be current to within one month of the date the annual distribution of that information. The rules also are modified to provide that such stations be identified by both call sign and channel number. This will ensure that subscribers are able to recognize the listed stations.

99. Under the consumer education requirements we are adopting, cable systems will have flexibility to provide the required information in foreign languages and, where it is warranted, should have the incentive to do so in order to be responsive to subscribers' needs. We do not find it is necessary to require cable systems to provide consumer education in both English and a foreign language in communities with sizeable foreign language speaking populations.

100. The following is a summary description of the revised consumer education requirements. Cable systems will be required to inform their subscribers, on an annual basis, that: 1) for the next few years, they may not be required to carry all broadcast signals available off-the-air in the community; 2) after FILL IN EXPIRATION DATE They will no longer be required to carry any broadcast signals; and, 3) it may be necessary to use an antenna in conjunction with an input selector switch up access broadcast signals available off-the-air and not carried by the cable system. In addition, cable systems will be required to describe the function of an input selector switch, explaining the differences between mechanical and electronic switches,

and the fact that use of either type of switch will aid the viewer in obtaining independent access to off-the-air television service. Further, cable operators will be required to inform subscribers that a range of input selector switches may be obtained from sources other than the cable system. Finally, cable operators will be required to identify by call sign and channel number any broadcast television signals that may be available off-the-air in their community that they do not carry.

101. This consumer education information must be provided to all nw subscribers at the time of installation of the cable service and to existing subscribers that do not have input selector switches within six months after the effective date of the new rules and thereafter on an annual basis. This will be a continuing requirement that will not expire at the end of the five year transition period. This annual consumer education requirement and the annual input selector switch offering may both be satisfied by including the information in monthly subscriber billings or other mailings.

REVISIONS TO THE INTERIM MUST CARRY RULES

102. Numerous petitioners seek clarification of, and suggest modifications to, specific provisions of the interim must carry rules, including the standards for qualified status, the definitions of tier of cable service and useable activated channels, the nonduplication, sunset and dispute resolution provisions, the provisions respecting carriage rights of noncommercial educational stations, commercial and noncommercial translators and satellite stations, and the exceptions for carriage and copyright payments.

Qualified Stations

103. *Viewing Standard.* Several petitioners address the requirement that in order to qualify for must carry status, commercial broadcast stations (other than "new stations") must attain at least an average share of total viewing

hours of two percent and a net weekly circulation of five percent in noncable households in the county where the cable system is located.

104. INTV seeks clarification of the viewing standard to recognize the carriage rights of stations for which "television survey season" ratings as defined in Section 76.55 of the rules are unavailable because adequate numbers of complete diaries are not returned by noncable television households. It proposes that Section 76.55 provide that once a station achieves qualified status for mandatory cable carriage eligibility, the station then maintains that status until a county coverage report containing adequate audience measurement data for a survey season shows that it no longer meets the viewing standard. INTV also proposes that in cases where adequate ratings data has never been available for a station, the station be permitted to utilize a special survey conducted by an independent audience survey organization that follows a methodology comparable to that used by recognized ratings services such as Arbitron and Nielsen.

105. While published audience data is available or nearly all broadcast stations, we recognize INTV's point that broadcast stations in the few areas where published audience survey data are not available would face a considerable burden in demonstrating that they meet the viewing standard on an annual basis. We find it desirable to permit broadcast stations to qualify for carriage rights for the remainder of the transition period once they initially demonstrate that they meet the viewing standard. However, we believe it is necessary balance this presumption of qualification with a means to permit cable systems to cease carriage of a station that no longer meets the viewing standard. On this basis, we are amending the qualifying station provisions to specify that stations are not required to reconfirm that they meet the viewing standard on a regular, recurring basis. However, at any time after one year from the time a station demonstrates that it meets

the viewing standard, a cable system may nullify the station's must carry eligibility if it demonstrates, using the methodology specified in Section 76.55 of the rules, that the station no longer meets the viewing standard. In response to INTV's request concerning special audience surveys, we observe that the rules, as adopted, plainly indicate that stations may utilize such special audience surveys to demonstrate that they meet the viewing standard.

106. Adelphia seeks modification of the viewing standard to allow for the use of community-specific audience measurement data in establishing or rebutting a station's status as "qualified". Adelphia claims that the use of such data would further the interests of the viewing public by qualifying stations in communities Where they actually have substantial viewership but might be unable to meet the two percent/five percent standard on a county-wide basis due to geographical factors such as size and terrain conditions. In addition, it asserts that use of a community-specific survey would relieve cable operators of the obligation to carry stations that do not have significant viewership and whose carriage would thwart viewer preference. We do not believe it is desirable to allow the use of community-specific data to measure audience data for viewing standard purposes. As indicated above, the regularly published reports of the major audience ratings services generally provide a convenient means for nearly all stations nationwide to demonstrate whether they meet the viewing standards. We believe that to permit use of community-based audience studies would not further the purposes of the interim must carry rules. Rather, to allow use of such surveys likely would result in widespread increased survey efforts on the part of both broadcasters and cable operators that would be costly and, thereby, would have the effect or subjecting the affected parties to unnecessary additional burden. Moreover, we believe that the requirement that qualifying stations deliver a good quality signal

to the principal cable headend will suffice to limit carriage to those actually receivable off-the-air.

107. Lincoln Broadcasting Company (Lincoln), the licensee of station KSTF-TV, requests that the viewing standard be modified to exempt any commercial station that certifies it broadcasts foreign language programming during at least one-third of the hours of an average broadcast week and one-third of weekly prime time hours. It states that the survey Services and methods prescribed by the new rules do not accurately measure foreign-language speaking viewership and, thus, without this exemption, foreign language programming stations will not be able to establish qualified status. Lincoln asserts that the use of special surveys to measure these audiences is prohibitively costly and subject to challenge based on methodology. It states that even if these hurdles could be overcome, stations would be unable to meet the viewing standard requirements until they have completed a full year's cycle of special surveys. Thus it requests that if its proposed exemption is not adopted, foreign language stations should be exempt from the viewing standard for at least one year from the effective date of the rules. Lincoln also requests that in the event the Commission elects not to change its rules in either of the above manners, that its petition be construed as a request for special relief regarding the viewing standard aspect of the interim must carry rules.

108. In developing the criteria for qualifying stations, we carefully crafted the new rules to avoid special carriage rights for stations based on their programming. Such preferred treatment tends to conflict with the strict content-neutral requirements of the First Amendment with respect to regulation that furthers a substantial governmental interest. We believe that to provide an exemption for foreign language stations from the viewing standard as requested by Lincoln would create a content-based provision of the type it is necessary to avoid. Moreover, we do not believe that such a general exception is essential to our objective

of preserving the commercial broadcast system as a competitive alternative source of programming during the transition to an environment without must carry rules. We also believe that the modifications to the viewing standard procedures we are making herein, as discussed above, will reduce the burden on stations that can only demonstrate that they meet this standard through special surveys. Lincoln's alternative proposed basis for special carriage rights— its difficulty obtaining the necessary viewer showing— thus also does not persuade us that different carriage rights are warranted. Accordingly, we are denying Lincoln's request.[63]

109. Adelphia believes that the definition of qualified station unconstitutionally limits the editorial discretion of cable operators located near foreign borders by making stations licensed by foreign governments ineligible for qualified must carry status. It also claims that to deny qualified status to foreign stations frustrates the viewing preferences of cable subscribers. Adelphia illustrates the problem as one facing cable systems located near foreign borders where their channels are occupied such that not all qualified stations are being carried. It states that in order to meet their must carry obligations, such cable systems may be forced to drop stations now carried that meet the mileage and viewing standards, but do not qualify for mandatory carriage because they are licensed by a foreign government. Adelphia requests that carriage of foreign-licensed stations which in all other respects satisfy the

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[63] Lincoln also requests that in the event the Commission elects not to change its rules in either of the above manners, that its petition be construed as a request for special relief regarding the viewing standard aspect of the interim must carry rules. We have decided not to rule on Lincoln's request for special relief as part of the instant Memorandum Opinion and Order, but will instead consider this request in a separate action. Our action herein is not intended to prejudge our separate action on Lincoln's request for special relief.

qualified station standard count toward fulfilling a cable system's required must carry complement.

110. At the outset, we observe that we crafted the interim must carry rules so as to require that only a limited portion of a cable system's channel capacity be devoted to mandatory signal carriage obligations. We believe, as discussed in the *Report and Order* and above, that these provisions are consistent with the *O'Brien* standard. Thus, the interim rules do not preempt cable operators' discretion to carry other video program services such as station licensed by foreign governments. Moreover, we believe that cable operators' editorial discretion is sufficient to ensure that they are able to tailor their mix of program services to meet subscriber preferences. In addition, the federal interest in ensuring that the broadcast television industry remains a competitive source of alternative programming during the transition period does not extend to service provided by stations licensed by foreign governments. The Communications Act nowhere contemplates access to foreign stations as an element of the national communications policy.

111. NITC believes that the viewing standard should be deleted on the grounds that it establishes unconstitutional classification preferences. It states that the viewing standard is a "popularity test," which, on the basis of ratings, subordinates the rights of one group, the less highly rated, to those of another group, the more highly rated, in violation of the First Amendment. NTIC claims that the viewing standard will cause particularly great harm to independent local stations that have to compete for audience with the often duplicative programming of distant broadcast stations or non-broadcast cable networks. NITC also states that similar harm would befall minority broadcasters who serve smaller audiences that are not measurable by the prescribed methodology but are significant nonetheless. It also asserts that the viewing standard fails to specify certain methodology requirements and, thus, it is imper-

missibly vague. SICC also believes that the viewing standard should be deleted from the interim must carry rules. It claims That the viewing standard, as measured by commercial ratings services, does not accurately reflect foreign language television viewing. Thus, SICC states that elimination of the viewing standard would avoid its discriminatory impact on eligibility for mandatory carriage in a manner more consistent with the First Amendment concerns of the *Quincy* court.

112. We reject petitioners' arguments that the viewing standard is unconstitutional and should be deleted from the interim must carry rules. The viewing standard does not establish classification preferences, but instead ensures that viewer program choice is reflected in the transitional period. As we stated in the *Report and Order:*

> [T]he economic effect of the rules on any individual station is not our primary concern. On the contrary, requirement that failing stations be carried might be inimical to the public interest, in that we might well be requiring cable systems to carry stations the public did not want to watch, thereby preventing the cable system from offering a program service the viewers preferred. This would run directly counter to the *Quincy* court's concern that our former must carry rules were unresponsive to consumer preference.[64]

Further, we continue to believe that the viewing standard is an accurate and appropriate means for identifying those stations that consumers prefer to watch. NITC, Lincoln, and SICC have not provided any evidence to persuade us that minority or foreign language audiences are unmesurable. Accordingly, the viewing standard, as adopted in the *Report and Order,* will be retained as part of the interim must carry rules.

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[64] *Report and Order, supra* at 895, n. 170.

113. In their supplemental petition, NCTA and CATA request that Sections 76.5(d) and 76.55 of the new rules be clarified to reflect the language in the *Report and Order* providing that commercial broadcast stations must meet the viewing standard for the *previous* television survey season. Reference to the "previous" television survey season was inadvertently omitted from the rules. Accordingly, the rules will be revised to correct this omission.

114. NCTA and CATA also object to the exemption of new stations from the viewing standard for 12 months following the date on which they begin operations pursuant to program test authority, and the "grandfather" provision for stations which commenced operations after July 19, 1985. They claim that these provisions do not pass constitutional scrutiny on the grounds that by creating long exemption periods, the rules are not sensitive to viewer preferences and unduly burden nonbroadcast cable services which must compete for cable carriage. NCTA and CATA seek modification of these provisions in accordance with the joint industry agreement proposal that new stations be permitted to satisfy the viewing standard by means of a special survey taken at anytime prior to completion of the first full television survey season following commencement of operations. They also request clarification that a station can be considered "new" only once and, thus, operational modifications such as increases in power and changes in antenna design and transmitter location, do not transform existing stations into new station for purposes of the interim must carry rules.

115. In the *Report and Order*, we indicated that we found it necessary to exempt new stations from the viewing standard in order to afford them an opportunity to gain a foothold in the market, thereby furthering our interest in maximizing program choices. We disagree with NCTA and CATA that the one year exemption for new stations and the extension of this exemption to stations commencing operation after July 19, 1985, are unconsti-

tutional. These provisions are not content-based and are narrowly tailored to further our interest in maximizing consumers' program choices. The one year period will afford new stations a reasonable period of time in which to stabilize its operations and to establish an audience for its programming. We do recognize petitioners' concern that operational changes by stations might appear to requalify them for "new" station status. Accordingly, we wish to clarify that stations will be eligible for "new" status only once, upon commencement of their initial program test authority. A major change in facilities will, therefore, not qualify a station for "new" station carriage rights.

116. WLIG requests that the exemption of new stations from the viewing standard be expanded. It argues that such stations do not have the viewership or financial ability to secure carriage on cable systems that may choose from among more than seven qualified signals to meet their must carry requirements. WLIG also contends that new stations need the fair opportunity that cable carriage can provide to help them survive in the currently unbalanced television market environment. Thus, it requests that the rules be modified to define as "new" those stations that began operations for the first time after January 1, 1983, and to require cable carriage of such stations for the full interim period of five years. WLI states that this definition of "new" would include approximately 96 commercial stations and that the five year period coincides with The interim period needed to achieve maximum diversity by reliance on market forces.

117. As indicated above, we believe that the exemption of new stations from the viewing standard is a necessary means to further our interest in maximizing viewers' program choices. However, we disagree with WLIG's argument that this exemption should be expanded. As indicated above, the one year period provides a reasonable amount of time for new stations to gain a foothold in the market. After this time a station and its programming can be

expected to overcome the initial hurdle of becoming familiar to potential viewers such that the size of its audience will be a reflection of the appeal of its programming rather than its new entry to the market. A one year limit on the exemption from the viewing standard also is consistent with our concern for minimizing the intrusiveness of the interim must carry rules on cable operators' First Amendment rights. Moreover, it is appropriate to extend this exemption to stations new as of July 19, 1985, the date of the *Quincy* decision, to provide cable subscribers an opportunity to become familiar with stations that may not have been carried after the former must carry rules were ruled unconstitutional. To grant this exemption to stations new prior to July 19, 1985, is unwarranted as such stations would have been entitled to carriage under the former must carry rules.

118. *Definitions.* WLIG also requests that use of the principal headend of the cable system as the reference point for calculation of the required 50-mile zone be replaced with a "home county carriage" provision, under which cable systems first would be required to carry stations licensed within the county to which the cable system is franchised as part of their 25 percent must carry complement. WLIG states this definition would prevent cable systems from circumventing Commission intent and frustrating the statutory purposes of local franchising by designating a particular headend as "principal" in order to reduce the number or makeup of broadcast stations within the 50-mile zone.

119. We are not persuaded that we should adopt WLIG's "home county carriage" approach as an alternative to use of the cable system's principal headend as the geographical reference point for signal carriage requirements. In this respect, we continue to believe that use of the principal cable headend as the designated reference point is the most appropriate means for determining signal carriage obligations. We are aware that many cable systems operate

multiple headend facilities and that it may be possible in some cases to choose a particular headend as "principal" in order to limit the number of broadcast stations eligible for must carry status. However, we believe it is important to provide cable operators with flexibility in this area an entrust to them responsibility for choosing their principal headend in a manner consistent with the spirit of the interim rules. Thus, we will continue to permit cable operators to use their discretion in designating their system's principal headend. While we expect cable operators will exercise this discretion in good faith, we will investigate and consider appropriate action on a case-by-case basis Where cable operators appear to be abusing this discretion by designating their principal headend so as to avoid signal carriage obligations.

120. Several petitioners request modifications to the rule providing that cable systems are required to carry qualified signals on their "lowest-priced Separately available tier of service." The Corporation for Public Broadcasting (CPB), the National Association of Public Television Stations (NAPTS) and the Public Broadcasting Service (PBS), filing jointly [CPB], and INTV request that the Commission clarify that when must carry signals are carried on a tier requiring use of a converter to receive qualified broadcast signals, the converter must be available at no cost additional to that charged for the lowest-priced tier which does not require use of a converter. CPB also requests clarification that where program services are available on separate tiers at a cost lower than the basic programming tier that includes broadcast stations, such "add-on" tiers do not qualify as a permissible must carry tier.

121. In a similar vein, Adelphia objects to the lowest-priced separately available tier definition on the grounds it does not take into consideration cable operators' need for flexibility to offer separately available multi-pay package of the add-on type described by CPB. It requests the rule be modified to define "tier" as "two or more video

program services which are not otherwise available individually." Adelphia states that this definition would ensure that qualified stations are carried on a tier of service most likely to have the widest distribution to cable subscribers and that cable operators would have maximum flexibility to package and market non-basic services in a manner most responsive to marketplace demands. WLIG also opposes the "lowest-priced" definition on the grounds it is subject to potential abuse. It states that cable operators could create a separate tier that included only must carry broadcast signals and price it slightly below the cost of the "true" basic tier which would include broadcast signals, satellite networks, and other services. Must carry signals that the cable operator did not want to provide its subscribers would not be carried on the slightly higher-priced tier. Subscribers effectively would be denied access to the full complement of must carry signals because they would not be willing to pay the price of a full tier of service to obtain access to only a few additional signals. WLIG states that this problem could be avoided by use of the already defined phrase "basic cable service" or by substitution of the phrase "most widely subscribed" for the phrase "lowest-priced."

122. We recognize that there may be confusion concerning the tier of service on which must carry signals are required to be carried. In the *Report and Order*, it was our intention to require that all must carry signals be provided at no additional cost to subscribers who purchase a tier of service on which any of the must carry signals are carried. Thus, we required that must carry signals be carried on a cable system's "lowest-priced separately available" tier of service. We acknowledge petitioners' concern that this term may permit practices inconsistent with our purposes. Accordingly, we will revise the rules to clarify that if any signals carried in fulfillment of must carry obligations are included on a service tier, then all must carry signals must be carried on that tier.

In addition, all signals carried in fulfillment of a cable system's must carry obligations must be included on the lowest-priced tier separately available to each cable subscriber.[65] The price of this tier of service must include the cost of any terminal device necessary to receive the service. In addition, the tier of service on which the must carry signals are provided must be accessible on any additional receiver connections which the subscriber may purchase.[66] We believe that this rule, as clarified, will ensure that subscribers have opportunity to access all signals carried in fulfillment of must carry obligations during the transition period. Our revised formulation of this portion of the rules will avoid the tiering problems anticipated by petitioners and will provide flexibility for cable operators to their multi-pay packages in a manner that will not conflict with our purposes or the requirements in the Cable Act.

123. Adelphia also objects to the definition of "useable activated channels" for determining cable system channel capacity. It states that the exclusion of only those channels set aside due to potential interference with aeronautical frequencies is inconsistent with The definition of "activated channel" in the Cable Act. In This regard, Adelphia refers to the leased access provisions in Section 612 of the Cable Act which exclude channels "otherwise required for use . . . by Federal law or regulation." Adelphia also requests that the definition of useable activated channels be modified to exclude channels unuseable pursuant to Sec-

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[65] Consistent with our earlier decision in *Monterey Cable TV*, 56 RR 2d, 159, *recon.* 98 FCC 2d 1281 (1984), however, a cable operator may put a must carry signal on a higher tier if the operator notifies it subscribers and offers free converters to all subscribers wishing one in order to watch That must carry signal.

[66] The record does not justify action on additional connections provided to subscribers free of charge at this time. Any party wishing to address further this issue may file a petition for rule making in accordance with Section 1.401 of the rules.

tions 76.610 through 76.618 of our rules concerning the operation of cable systems in the 108-136 MHz and 225-400 MHz bands, as Well as channels subject to direct pickup interference (DPI) resulting from strong local broadcast station signals.

124. We disagree with Adelphia's argument that the definition of useable activated channels in the interim must carry rules is inconsistent with that of "activated channel" in Section 612 of the Cable Act. Section 612(b)(5)(A) defines "activated channels" as:

> . . . those channels engineered at the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or government use. . . .

The definition in the interim must carry rules parallels this definition except that it excludes those channels "whose use for distribution of broadcast signals would conflict with technical and safety regulations," that is, those channels in the 108-136 MHz and 225-400 MHz bands. Thus, it appears that Adelphia argues not that the definition of activated channels in the Cable Act should be used, but rather that useable activated channels should be defined as those available for leased access pursuant to Sections 612(b)(1)(A) and (B). Use of this definition would significantly reduce the base of channels used to determine the maximum number of broadcast signals a cable system is required to carry.

125. The maximum number of signals required to be carried by cable systems, as determined using the definition of useable activated channels adopted, strikes the proper balance between the need to ensure effective competition during the transition period and to minimize the intrusiveness of our regulations on cable operators' First Amendment rights. The change requested by Adelphia

would tilt this balance in a manner contrary to the purpose of the interim must carry rules. With regard to Adelphia's suggestion that we exclude channels subject to direct pickup interference from the count of usable activated channels, we believe that for systems maintaining adequate radio frequency integrity, such interference is likely to be a problem only near an interfering transmitter and does not affect the majority of cable subscribers. It is not necessary to provide a general exclusion for channels on the basis of direct pickup interference. Rather, it is more appropriate to resolve any such problems that might occur on a case-by-case basis. Accordingly, we will not modify the definition of useable activated channels adopted in the *Report and Order.*

Mandatory Carriage Provisions.

126. *Duplicating Stations.* The ABC Television Affiliates Association (ABC Affiliates) opposes the interim must carry rule provision exempting from carriage the entire schedule of a station's programming, including both duplicated and nonduplicated programming, of qualified stations affiliated with the same commercial network as another qualified station carried by a cable system. Consistent with its original proposal, station carried by a cable system. Consistent with its original proposal, ABC Affiliates requests that the Commission modify this rule to require carriage of the nonduplicated, but not the duplicated, programming of all qualified stations, including commercial and noncommercial network affiliates and independent stations. It believes that in its current form, the nonduplication provision discriminates against network affiliated stations in favor of independent stations and, thus, violates the First Amendment and the equal protection clause of the Fifth Amendment. It also states that the rule is arbitrary and capricious because it contradict the Commission's stated legal and policy rationales by exempting from mandatory carriage programming that would

maximize program choices, compete for viewers with other eligible broadcast stations and cable program, and meet viewers' interests and preferences.

127. We are not persuaded that we should alter the provisions concerning carriage of stations affiliated with the same commercial network as requested by ABC Affiliates. Carriage of only the nonduplicated portion of an affiliated station's program service would, in practice, require cable systems to devote an entire channel to carriage of such programming. The channel would have to be available at all times when the nonduplicated programming is broadcast. Any other use of this channel by the cable system would be on a secondary basis, in accordance with a schedule controlled by the station. As a practical matter, therefore, it is likely that a cable operator required to carry the nonduplicated portions of affiliates' programming would simply carry the duplicated affiliates in full. Accordingly, we disagree with ABC Affiliates that the requested modification would contribute to maximizing the variety of program choices offered by cable systems. Rather, we believe the necessity of the channel set aside pursuant to the requested arrangement would prevent cable systems from offering another full-time program service on that channel. This result is contrary to the interests of cable operators, cable programmers and the viewers. Further, we disagree that the rules, as adopted, arbitrarily discriminate against duplicating affiliates in favor of independent stations. Carriage of the entire schedule of programming of independent stations allows cable systems to offer a complete schedule of nonduplicated programming that makes full use of the cable channel on which it is carried. In view of these considerations, we are denying the ABC Affiliates' request.

128. We observe that the rules did not reflect our decision in paragraph 153 of the *Report and Order* that where the maximum number of qualified stations is less

than or equal to the maximum number of channels that the system must carry and both a parent and its satellite television stations qualify for carriage, a cable system is not required to carry both stations, but may chose which station to carry. The rules also did not reflect that under the same circumstances, that a cable system is not required to carry both a noncommercial station and its translator if both qualify for carriage. We are amending the rules to correct these omissions.

129. *Dispute Resolution.* INTV seeks to change the two-step procedure for broadcast station signal carriage requests and mandatory carriage dispute resolution adopted in the *Report and Order.* It proposes that Section 76.58(c) be modified to provide that a broadcast station may request a ruling with respect to its demand for carriage by the cable system if it simultaneously files duplicate copies of the carriage demand with the Commission. A cable system receiving such a demand would be required to respond to the station and simultaneously to file such response with the Commission. Under this approach, if the cable system agrees to carry the broadcast station, Commission proceedings on the matter would automatically be terminated. Otherwise, the Commission would treat the filings as pleadings for purposes of resolution of the matter. INTV asserts that this modification would streamline the dispute resolution procedure, thereby permitting more expeditious handling of cable carriage disputes. In considering INTV's request, we find that it is more appropriate to encourage cable systems and broadcast stations to resolve carriage disputes among themselves. Disputes should be brought to the Commission only where the parties are unable to reach agreement after having attempted to do so in good faith. This approach will minimize administrative burdens on the Commission, cable systems and broadcast stations, whereas INTV's approach would encourage parties to invoke formal administrative procedures and to incur the associated legal

costs in cases where the matter could be resolved informally among the parties.

130. In the *Report and Order*, the text at paragraph 158 indicated that a cable operator must respond to a broadcaster's request for carriage with a written response within 30 days, while Section 76.58 of the new rules provided a 15 day response period. It was our intention to provide cable operators with 15 days to respond to a broadcaster's request for carriage. Thus, the text was incorrect. Accordingly, we hereby clarify that cable operators will have 15 days to respond to requests for carriage.

Noncommercial Educational Stations

131. Several parties representing public noncommercial educational television interests, as well as NCTA and CATA, address the interim must carry provisions affecting noncommercial broadcast stations. CPB believes that the interim must carry rules inadequately protect the governmental interest in the unique services provided by public television programming. It states that as recognized and articulated by the Commission in the *Report and Order*, the governmental interest in public television is sufficient to justify its original proposal to require cable systems to carry all nonduplicating local public television stations or, at a minimum, to require cable operators to carry all local, nonduplicating public television stations (in addition to those required by the interim must carry rules) where activated channels are not otherwise being used. CPB states that the latter proposal would not impose a burden on cable operators and would facilitate viewer awareness of public stations, thereby enhancing the prospects that they will continue to gain audience and support when the interim period expires. It concludes that the substantiality of the governmental interest in public television resolves any dispute as to the constitutionality of the proposal. In this regard, CPB also requests that Section 76.56 of the rules be modified to include language from the *Order* spec-

ifying that cable systems have to carry "at least" one or two noncommercial stations, and to provide that where a cable system's must carry quota is not otherwise filled, it is required to carry additional local public television station up to its requirement.

132. In a similar vein, CPB proposes lowering the cable system channel capacity cap for carriage of at least two noncommercial stations from 54 or more channels to 25 or more channels. It criticizes the designation of 54 or more channels as arbitrary and submits data to show that under the former must carry rules, 72 percent of the cable headends that carried two or more public television signals had 25 or more channels. CPB further proposes modifying the rules to provide that a public television station qualifies for mandatory carriage if the cable community lies in whole or in part within the station's Grace B contour rather than if the reference point of the station's community of license lies within 50 miles of the principal headend of the cable system. It claims this modification is necessary to reflect the fact that, unlike commercial stations which are generally engineered to provide the strongest possible signal to their community of license, many public television stations are located according to plans designed to provide Grade B service to an entire state or region.

133. On the other Side of this issue, NCTA and CATA seek elimination of the mandatory carriage rights afforded noncommercial stations. They state that these carriage rights, including, for example, the exemption from the viewing standard, treat noncommercial stations in a manner preferential to, and discriminatory of, commercial stations that violates the First Amendment. NCTA and CATA claim that there is no evidence that the availability of noncommercial stations will be endangered if their carriage rights are put on an equal footing with those of commercial stations. Moreover, they state that the justification for such preferential treatment on the basis of the public interest value of the alternative programming provided by

noncommercial stations makes plain that the regulations are content based and, hence, unconstitutional. In this regard, they argue that government funding of public stations does not justify ignoring the constitutional prohibition against interfering with another speaker's editorial judgment.

134. In The *Report and Order*, we recognized that the federal interest includes maintaining access by cable subscribers to the alternative program services provided by noncommercial educational stations during the transition period! Therefore, we adopted distinct provisions for carriage of such stations in the interim must carry rules. In recognition of their unique role in our television system, we extended to noncommercial educational stations certain advantages with respect to signal carriage rights. These advantages are:

1) Noncommercial stations and translators do not have to meet the viewership standards;
2) All cable systems, including those with 20 or fewer channels, must carry at least one qualified noncommercial station or translator;
3) If two or more noncommercial stations are eligible, cable systems with 54 or more channels must carry at least two such stations, if available;
4) Cable systems must carry duplicating noncommercial stations up to the limit of their signal carriage obligations;[67] and,

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[67] The interim must carry rules provide that where the number of qualified stations is less than or equal to the maximum number of channels that a cable system must devote to carriage of off-the-air signals, the cable system is required to carry all such signals. However, cable systems are not required to carry: 1) The signals of more than one station affiliated with the same commercial network; 2) the signals of both a satellite and its parent television station where both otherwise qualify for carriage; or 3) the signals of a parent noncommercial station and its satellite and translator stations. There is no exception permitting

5) Noncommercial educational translators are eligible for qualified status.

In adopting these provisions, we stated that they strike an appropriate balance between the competing needs to provide access to noncommercial educational programming and to protect cable operators' opportunities for exercising their editorial discretion during the five-year interim period.

135. We are not persuaded by petitioners' arguments on either side of this issue that we should alter our initial decision concerning carriage rights for noncommercial stations. Petitioners requesting additional carriage rights for these stations have not demonstrated that the interim must carry rules do not ensure the availability of a reasonable quantum of noncommercial broadcast service to all cable subscribers. On the other side, we do not believe the advantageous treatment afforded noncommercial stations unconstitutionally discriminates against commercial stations, but rather is necessary to further the federal interest in noncommercial educational television service long recognized by this Commission and the Congress.[68] The noncommercial station carriage provisions, as adopted, strike the appropriate balance between the two important and conflicting federal objectives involved in this issue. Ac-

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cable systems not to carry the signals of noncommercial stations affiliated with the same network. Thus, a cable system must carry noncommercial stations that duplicate the same network programming to the extent that the number of qualified stations is less than or equal to the maximum number of channels the cable System must carry. For example, if a cable system were obligated to carry up to eight broadcast stations and there were five qualified commercial stations, no two of which were affiliated with the same network, and three noncommercial PBS affiliated stations, the cable system would have to carry all of these stations. *See Report and Order, supra*, at paragraph 153, and 47 CFR §76.56.

[68] *See Report and Order, supra* at paragraph 117.

cordingly, we will not modify the basic signal carriage provisions for noncommercial educational stations.

136. CPB, Educational Broadcasting Corporation (EBC), and American Christian Television Services, Inc. (ACTS) each request that we delete the rules that make eligible for qualified status only those noncommercial educational stations operating on reserved frequencies and that we extend such eligibility to noncommercial stations operating on nonreserved frequencies. Petitioners argue that the Commission's stated justification for the mandatory carriage rights afforded noncommercial stations is to protect viewers' access to public television programming and, therefore, the rules should encompass all stations broadcasting such programming, regardless of their location on the spectrum. They recommend use of the standards for noncommercial educational stations in Section 73.621 of the rules as the fundamental method of determining the noncommercial status of stations operating on nonreserved frequencies. ACTS alternatively suggests requiring stations to demonstrate nonprofit charitable status as recognized by the IRS pursuant to 26 U.S.C. §501(c)(3).

137. The interim must carry rules exempt otherwise eligible noncommercial educational stations operating on reserved channels from the viewing standard in order that they may qualify for carriage. Further, they specify that each cable system must carry at least one, and in some cases at least two, qualified noncommercial educational stations, depending on its channel capacity. A cable system also is required to carry additional qualified noncommercial signals if the number of qualified commercial stations plus the number of noncommercial stations it is required to carry is less than the maximum number of signals the system is required to carry. In the *Report and Order*, we recognized that noncommercial stations are not subject to the same market forces as commercial broadcast and cable television. Our objective in providing special treatment to noncommercial educational stations was to ensure cable

subscribers' access to noncommercial programming in the transition period and, thus, to protect the federal interest in maintaining the availability of such programming "to all of the citizens of the United States."[69] Upon examining petitioners' position, we recognize that by limiting the exemption from the viewership standard only to noncommercial educational stations assigned to reserved channels, we inadvertently excluded from this exemption those noncommercial stations assigned to nonreserved channels. We also inadvertently failed to specify that the noncommercial station carriage requirements apply only to stations providing such program services.

138. Therefore, we will modify the rules to correct these oversights. The revised rules will provide for extension of noncommercial educational station carriage rights to all noncommercial stations that are the subject of the federal interest, and only to such stations. We believe the most appropriate and convenient means for accomplishing this is to apply the noncommercial station carriage provisions to all stations operating on reserved channels and to provide for their extension to noncommercial stations operating on non-reserved channels on a case-by-case basis. The most useful and effective approach for identifying noncommercial educational stations operating on nonreserved channels that should be eligible for noncommercial carriage rights is to rely on the standards used to qualify stations for the Public Telecommunications Facilities Program (PTFP) administered by the National Telecommunications and Information Administration.[70] This approach provides

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[69] *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6).

[70] *See* 15 CFR Part 2301.4(a), which provides that "[i]n order to apply for and receive a PTFP grant, an applicant must be: (1) A public or noncommercial educational broadcast station; (2) A noncommercial telecommunications entity; 93) A system of public telecommunications entities; (4) A nonprofit foundation, corporation, institution, or asso-

a more definite standard than the noncommercial eligibility criteria contained in Section 73.621 of our rules. Use of the PTFP standards also will provide an administratively efficient means for determining qualified noncommercial stations operating on nonreserved channels. We observe that noncommercial educational stations operating on nonreserved channels in most cases will already have demonstrated that they meet these standards to obtain PTFP funding. To qualify for noncommercial carriage rights, such stations merely will need to submit proof that they have met the PTFP standards.

139. We also will revise the rules to provide that only stations qualified under the above criteria are eligible for carriage in fulfillment of the minimum noncommercial station carriage requirements. We believe that these modifications will ensure that the service of those noncommercial educational stations which provide statutorily defined "public telecommunications service" will be available to cable subscribers.[71]

140. Television Communications, Inc., requests that the carriage rights afforded to noncommercial stations be extended to religious specialty stations on the grounds that such stations have specialized programming appeal. We are not persuaded to do so. While religious specialty stations, like foreign language stations, provide specialized programming, they are not within the category of noncommercial stations for which Congress and the Commission have identified a unique concern and for which discrete statutory and regulatory treatment has been established.[72]

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ciated organized primarily for educational or cultural purposes; (5) A nonprofit foundation, corporation, institution, or association organized for any purpose except primarily religious to plan for the provision or public telecommunications services; (6) A state or local government or agency or a political or special purpose subdivision of a state.

[71] *See* 47 USC §397(14).

[72] *See* 47 U.S.C. §§396 and 399B; *see also* 47 U.S.C. §§73.606 and 73.621.

In order to avoid regulation broader than necessary to achieve our narrowly stated federal interests, therefore, we believe specialized carriage perogatives should not be extended to specialty stations generally. Thus, we find that Television Communication's request would conflict with our First Amendment objectives. Accordingly, we are denying its request to extend the noncommercial station carriage provisions to religious specialty stations.

141. CPB requests modification of the rule that affords noncommercial station mandatory carriage rights to noncommercial translators of 100 or more watts to extend those rights to such translators operating with 5 watts or more output power. It states that the present 100 Watt limit would exclude 297 of the 930 translators providing public television service, including 224 VHF translators. In addition, it states that the Commission has not explained its departure from its earlier rationale that noncommercial translators of 5 or more watts are such an essential part of the nation's public telecommunications system that they require mandatory carriage status under the former must carry rules. We agree with CPB that such translators constitute an essential part of the noncommercial television system by providing service to areas not otherwise capable of receiving a full service noncommercial station. In such areas, it is important that subscribers to the local cable system be able to access these translators during the transition period. Accordingly, we will revise the rules to make noncommercial translators operating with 5 or more watts output power eligible for qualified must carry status in the same manner as full service noncommercial stations.

Carriage of Commercial Translators

142. Hubbard Broadcasting, Inc. (Hubbard) requests that the carriage rights afforded to commercial stations be extended to include commercial translators operating with 100 or more watts. It submits that it is illogical to dis-

tinguish between commercial and noncommercial translator stations for must carry purposes, and believes that the development and maintenance of off-the-air translators in rural areas requires a uniform and comprehensive must carry policy. Hubbard notes that the former must carry rules included such translators, and states that there are still vast areas of the country where the only available off-the-air television service is provided by translator stations. Hubbard also states that to differentiate between noncommercial and commercial translators for must carry purposes based on a determination that the former provide programming of greater public interest value raises serious First Amendment questions. Hubbard asserts that its request would be permissible under the *O'Brien* standard.

143. We do not believe it would be appropriate to afford eligibility for qualified must carry status to commercial translators as requested by Hubbard. Our purpose in providing signal carriage rights to commercial stations is to preserve the commercial broadcasting system as a competitive alternative source of programming during the transition to an environment without must carry rules. The essential aspect of this system is the service provided by full service stations. Translators and low power television facilities provide service that is secondary and supplementary to that provided by full service stations. Achievement of our objectives for the interim must carry rules does not require that we extend must carry eligibility to commercial translators and low power television stations. Moreover, such provisions would be inconsistent with the requirement under the *O'Brien* standard to minimize the intrusiveness of our regulations on cable operators' First Amendment rights.

Carriage of Other Stations

144. CPB, NAB, Joint Broadcast Television Petitioners (Joint Broadcast Petitioners), Midwest Television, Inc. (Midwest), and Meredith Corporation (Meredith) each re-

quest clarification as to whether terrestrial satellite television stations, that is, full service broadcast stations that rebroadcast some or all of the programming of a full service television statior, are eligible to qualify for mandatory carriage under the interim must carry rules. In their view, the *Report and Order* and the new rules are confusing on this point. Specifically, petitioners state their belief that because satellite stations operate on channels regularly assigned to their community of license under Section 73.606 of the rules, they are made eligible for qualified status by the incorporation by reference of Section 76.5(b) into the definition of "qualified broadcast station" in Section 76.5(d), as amended. They further state that paragraph 153 of the *Report and Order* supports this view since it provides that "where both a satellite and its parent television station qualify for carriage, the cable system need not carry both stations and may choose between them. . . ." However, they state that this conclusion is confused by langauge in paragraph 144 of the *Report and Order* which includes satellite stations among those stations not entitled to carriage under the new rules. NAB believes that paragraph 144 refers to satellite television stations of types other than those encompassed by Section 76.5(b), such as direct broadcast satellites. These petitioners argue that satellite stations should be eligible to qualify for must carry status.

145. The confusion as to whether terrestrial satellite broadcast stations are eligible to qualify for must carry status stems from an inadvertent misstatement in paragraph of 144 that "satellite stations" are not entitled to carriage under the new rules. This statement is intended to refer to direct broadcast satellite stations and not terrestrial satellite stations. Terrestrial satellite broadcast stations are eligible for must carry status. Inasmuch as the rules, as adopted, plainly reflect this interpretation, revisions thereto are not required.

146. In a similar vein, Joint Broadcast Petitioners also seek clarification that nothing in paragraph 144 is intended to restrict the freedom of cable operators to carry stations such as foreign television stations, direct broadcast satellite stations, low power television stations and commercial translator facilities, which are excluded from eligibility for qualified must carry status. We take this opportunity to clarify that nothing in paragraph 144 or elsewhere in the *Report and Order* is intended to restrict cable operators' freedom to carry programming of stations that are excluded from eligibility for must carry status. Quite to the contrary, our purpose is to increase, to the extent possible, cable operators' freedom to decide what signals they will carry. We will modify the rules to specify that after satisfying their interim must carry obligations, cable systems, to the extent permitted by Commission rules and other legal requirements, may carry any other broadcast stations or program services at their discretion.

Payments to Cable Systems

147. NAB, INTV and TOC each request modification of the rule permitting cable systems to receive payments for carriage from stations that either are not qualified or are qualified but are not carried as part of the cable system's complement of must carry stations. These petitioners argue that to permit such payments creates incentives for cable operators to disregard subscribers' viewing preferences and to select stations for carriage to fulfill must carry obligations in a manner that would yield the greatest compensation from other qualified stations. NAB requests that this rule be modified in accordance with the joint industry agreement to prohibit payments by qualified stations whether or not they are carried to fulfill must carry obligations, or by stations that would have been entitled to carriage under the former must carry rules. INTV believes that any payments other than those provided for in paragraph 157 of the *Report and Order* respecting copyright fees and delivery of a good quality signal to the

cable headend should be prohibited. TOC requests that we prohibit payment by any television station as a condition for carriage on a cable system.

148. We reject petitioners' request to modify the rules to prohibit cable systems from receiving any payments for carriage, other than those associated with delivery of a good quality signal and copyright fees, by broadcast stations not carried in fulfillment of signal carriage obligations. We believe that to prohibit such payments would, in fact, distort the operation of market forces in a manner that would disregard viewer preferences. In situations where cable systems are not obligated to carry a particular broadcast station, and a channel is available, there are likely to be alternative program sources competing with the broadcast station to occupy the channel. Under the "no payment" approach requested by petitioners, broadcasters would be at a competitive disadvantage with respect to other program sources in obtaining cable carriage. For example, if a broadcast station and its competitors were equally attractive to the cable system, and the latter were willing to pay for carriage, then the broadcast station would not be able to compete effectively for the channel and would not be carried. Further, even if a broadcast station were more desirable than its competitor, the latter would be able to pay a fee that might outweigh that factor. The result might be that broadcasters not carried in fulfillment of must carry obligations would be harmed if they were unable to pay for carriage. Thus, we continue to believe it is appropriate to permit payments for carriage by stations not carried in fulfillment of must carry obligations.

149. In considering the payments issue, we are concerned that prohibition on "payments" to cable systems by stations carried in fulfillment of signal carriage obligations might be interpreted to apply only to direct, monetary payments. Thus, it might appear that cable systems could arrange for indirect, nonmonetary considerations for

carriage of stations carried in fulfillment of signal carriage obligations. Examples of such indirect payments would be where a station might provide the cable operator with advertising time for the cable system's premium services or where a cable operator might employ channel repositioning to circumvent the intent of our rules and extract payment for carriage. Arrangements for indirect consideration would be most likely to occur in cases where the number of qualified stations is greater than the maximum number of signals that the cable system is required to carry. We emphasize that indirect payments by signals carried in fulfillment of must carry requirements are not permissible. To clarify this point, we are amending the rules to specify that the prohibition on payments to cable systems by stations carried in fulfillment of must carry obligations applies to both direct (monetary) and indirect (nonmonetary) payments.

150. The interim must carry rules permit cable systems not to carry an otherwise qualified station that is considered a distant signal for copyright purposes and to accept reimbursements from a qualified station for any copyright fees associated with the station's carriage. WLIG believes that these provisions artifically exclude many local stations from eligibility for must carry status. It believes the rules should not automatically exclude stations from eligibility for must carry status if they are considered distant signals under the compulsory license scheme. WLIG requests the rules be modified to provide that such stations are eligible to qualify for must carry status, but cable systems, as a condition of carriage, may require them to pay the copyright fees incurred as a consequence of Their carriage. NAB seeks clarification as to the amount of permissible payments. It states that the parties to the joint industry agreement intended to limit such reimbursements to the incremental increase in copyright payments as a result of carriage of a station considered to be a distant signal. Thus, NAB requests that the rules be modified to specify

that the compensation permitted is limited to the costs attributable to any increase in the number of distant signal equivalents in the payment formula under the compulsory license due to the expansion of the carriage radius.

151. We recognize that there is some ambiguity in the provisions respecting carriage of signals considered distant under the compulsory license scheme and payments by such stations as reimbursements for the associated copyright fees. In the *Report and Order*, it was our intention to provide that stations considered distant signals for copyright purposes not be eligible to qualify for must carry status regardless of whether they reimburse the cable operator for any copyright fees associated with their carriage. We disagree with petitioner arguments that "distant signals" should be eligible for must carry status. In this regard, we believe that must carry eligibility for such stations in some instances would impose unnecessary additional carriage obligations on cable systems. Accordingly, we will modify the rules to clarify that broadcast stations considered distant signals for copyright purposes are not eligible To qualify for must carry status. Consistent with this clarification, We also will eliminate the provisions concerning reimbursement payments for copyright fees incurred for carriage of such stations. Thus, stations considered to be distant signals may pay for carriage in the same manner as other stations not carried in fulfillment of must carry obligations.

Sports Blackout Rule

152. Adelphia states that the interim must carry rules affect the Commission's sports blackout rule contained in Section 76.67 in such a way as to potentially increase the number of sporting events which cable operators are required to black out. Specifically, it points out that since the interim must carry rules in effect increase the specified zone of a television station from 35 to 50 miles and impose a limit on the number of qualified stations a cable operator

is required to carry, a greater number of cable systems will be affected by any existing sports blackout, while at the same time fewer broadcast stations carrying sports events will qualify for carriage. Adelphia states that as a result, the existing exemption from blackout requirements is narrowed. It believes that this result is contrary to the Commission's longstanding policy of limiting blackout protection to the smallest area necessary to protect gate receipts and ensure attendance. Thus, Adelphia requests that we modify Section 76.67 to provide that the 35 mile zone remains applicable for sports blackout purposes. If further requests that the rule be modified to provide that a cable system need not provide sports blackout protection if a sports event is available live on a broadcast television signal which is being carried on the cable system and which would have been entitled to assert carriage rights under the former must carry rules.

153. In adopting the interim must carry rules, it was not our intention to alter the provisions of the sports blackout rule; nor were changes to it subject to notice and comment. Thus, the changes to this rule resulting from adoption of the interim must carry rules were inadvertent. Therefore, we will modify the sports blackout rule to ensure that the application of the rule remains the same as it was under the former must carry rules. We disagree with petitioners' contention that the interim must carry rules change the applicable specified zone for purposes of the sports blackout rules. The term "specified zone" is defined in Section 76.5(f) of our rules as "[t]he area extending 35 air miles from the reference point in the community to which that station is licensed . . ." This definition is not affected by any action we have taken in this proceeding. However, the reference in the rule to "mandatory signal carriage" is affected because it refers to a specific set of broadcast stations that is altered under the new rules. These same signals also can be referenced by the characteristics that qualified them for must carry status

under the former must carry rules. Accordingly, we are revising the sports blackout rule to eliminate the term "mandatory signal carriage" and to replace it with the characteristics previously used to describe those signals that were entitled to must carry status.

OTHER POLICY ISSUES

154. Century asserts that the circumstances leading to adoption of the new rules constitute denial of due process. It argues that this proceeding was instigated, perpetuated, and dominated by political activities of an extraordinary nature by Congress. Century asserts that however appropriate such "legislative" activities may otherwise be, the intended, perceived? and actual impact of such coercion upon the independence and objectivity of the Commission's proceedings is manifest. It, therefore, submits that resolution of this proceeding, and especially rulings upon matters of fundamental law, have been unduly influenced by elements irrelevant and extraneous to judicious disposition of constitutional questions and liberties.

155. We find no validity to Century's allegation of impropriety on the part of the Commission in this rule making proceeding.[73] Century has not provided any evidence or documentation to substantiate its claim of the denial of due process. All interested parties were afforded ample opportunity to participate in this proceeding and all the documents received, including correspondence, were placed

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[73] On March 9, 1987, Century filed a "Motion to Vacate Report and Order and for Termination of Proceeding." In this Motion, Century claims that the Commission failed to follow proper administrative procedures and to adhere to prescribed regulations and standards. These are essentially the same arguments that were made in the several pleadings already filed by these parties and that we are rejecting for reasons as discussed herein. We find no new evidence in this filing to bolster Century's earlier arguments. Accordingly, we find no merit in Century's motion and are denying its request to vacate the *Report and Order* and to terminate this proceeding.

in the public record. Further, Century seems to dispute our responsibility, once we determined a need for some form of interim mandatory carriage regulation, to seek a rationale for that regulation that would withstand judicial review. We indicated in the *Report and Order* that must carry rules are needed on an interim basis until consumers become aware of the need to maintain independent access to off-the-air signals and have opportunity to obtain such capability through input selector switches. Yet in formulating such rules, we also were well aware of the Court's basis for invalidating our former must carry rules. Therefore, it was necessary and appropriate to tailor the interim must carry rules such that they will withstand judicial scrutiny.

156. TBS contends that, if we decide not to eliminate the interim must carry rules, then we should stay the effective date of the rules pending a determination by the Court of Appeals on the merits of the TBS petition. TBS submits that, aside from the likelihood that it will prevail on the merits of its position, the potential for irreparable harm to itself and the possibility of harm to other parties and the public interest warrant a stay. It argues that the courts have consistently held that denial, or threatened denial of constitutional rights of freedom of speech and expression, constitutes irreparable harm for the purposes of issuing a stay or injunctive relief. TBS also claims that a stay would cause no significant harm to the other parties to this proceeding. In this respect, it states that a stay would merely preserve the status quo, in which there are not must carry rules and cable operators are free to exercise their discretion to select the programming that will satisfy the needs and interests of their subscribers.

157. We find that it would not be appropriate to delay the effective date of these rules any further, as TBS contends. This proceeding has been exhaustive and lengthy, affording participation by all interested parties and permitting the Commission to carefully consider all possible

alternative approaches. The regulatory program we have adopted is constitutionally and statutorily sound. Also, we do not agree with TBS that a stay pending judicial review is appropriate. TBS claims that denial or threatened denial of constitutional rights of freedom of speech and expression constitute irreparable harm for the purposes of issuing a stay. In our view, the new rules do not unconstitutionally infringe the rights of cable operators. Rather, the new rules balance the need for ensuring consumers' access to off-the-air signals with the rights of cable operators to choose the signals they desire to carry by limiting the number of signals entitled to mandatory carriage. TBS further argues that there will be no significant harm to other parties in this proceeding if a stay were granted. We believe that in the absence of interim must carry rules, consumers would be harmed if they were denied access to local broadcasting service not carried on their cable systems and they have not yet become aware that they have the capability to receive local signals off-the-air by using an input selector switch and antenna, and, therefore, they have not yet taken steps to regain that capability if they so desire.

PROCEDURAL MATTERS

158. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

The Commission's must carry rules for cable television systems were ruled constitutionally invalid in *Quincy Cable TV, Inc. v. FCC.* After examination of the record, the Commission determined that the most appropriate course of action in this matter was to adopt a two-part regulatory program that will provide an orderly transition from the current situation where there is need for must carry regulation, to its long-term objective of developing a video marketplace in which consumers will be able effectively to choose between cable and broadcast television program services. The first part of this program required cable systems to offer their subscribers input selector switches that enable use of an antenna in conjunction with cable service and to implement a consumer education program to inform subscribers that it may be necessary to have off-the-air reception capability to receive all the available broadcast signals. This program is intended to eliminate, over time, the current perceived capability of cable systems to limit their subscribers' access to over-the-air broadcast stations. The second part of this program consists of interim must carry rules that will expire at the end of five years. These rules will provide for an orderly transition to a market environment where must carry rules are no longer necessary. During the transition period, the input selector switch offer and consumer education requirements will work gradually to supplant the need for must carry rules and to assure subscribers' access to local television broadcast stations.

We have modified the specific requirements of this program to reduce the burden it imposes on the regulated parties, particularly the cable industry. We have replaced the requirements for cable systems to provide switches to

their subscribers at no cost with a requirement merely to offer switches to subscribers. Cable systems thus will be free to set a price for purchase or lease of input selector switches, including associated hardware and installation. In addition, cable systems located in areas where there are no available off-the-air signals will not be subject to any portion of the new requirements.

II. Summary of issues raised by petitioners in response to the final regulatory flexibility analysis, Commission assessment and changes made as a result.

A. *Issues raised.* No petitioning or commenting parties raised issues specifically in response to the final regulatory flexibility analysis. However, many parties objected to the economic burden they claim would be imposed on the cable industry as a result of the new program, particularly the requirement to provide input selector switches to subscribers at no cost. The revised input selector switch requirements and the full exemption from the rules for cable systems located in areas where there are no available off-the-air signals will resolve these concerns. In addition, the modifications to the rules to specify the consumer education requirements as a series of general requirements rather than specific suggested language will provide cable systems with additional flexibility to provide their subscribers with information suited to their particular circumstances. Thus, the revised program will substantially reduce the economic burden on all cable systems. We also believe that our program as revised herein will continue to provide for the needs of the commercial and noncommercial television industries as discussed in the final regulatory flexibility analysis.

B. *Assessment.* The revised input selector switch, consumer education and interim must carry requirements will be significantly less burdensome than those adopted in the *Report and Order.* While these revised rules will impose some burdens on cable operators, they are necessary to the achievement of our federal objectives.

C. *Changes made as a result of petitions and comments.* While no parties filed petitions or comments concerning the final regulatory flexibility analysis, many parties suggested alternative regulatory policies. Our revisions to our two-part program reflect our consideration of these suggestions and the effect of our policies on small business entities in both the broadcast and cable industries.

III. Significant alternatives considered and rejected.

We have considered all the arguments and alternatives presented in the petitions and comments responding to the *Report and Order.* After full consideration of all the issues raised therein, we have revised the rules in a manner that is most appropriate in light of the facts and issues presented.

159. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget by that Act.

160. The Secretary shall cause a copy of this *Memorandum Opinion and Order,* including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.* (1981)).

161. Accordingly, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act and Section 1.106 of the Commission's rules, IT IS ORDERED THAT the petitions for reconsideration of the *Report and Order* filed by parties named herein ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects. In addition, IT IS ORDERED THAT Part 76 of the Commission's rules IS AMENDED as set forth in Ap-

pendix B, effective June 10, 1987. IT IS FURTHER ORDERED THAT the "Motion to Vacate Report and Order and for Termination of Proceeding" filed by Century Communications Corp., *et al.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Attachments: Appendices A and B

APPENDIX A

Petitioners

1. ABC Television Affiliates Association
2. Joint Petition by Adelphia Communications Corporation, Arizona Cable Television Association, Bachow and Elkin, Inc., Coaxial Communications, The Essex Companies, Falcon Cable TV, Hauser Communications, Inc., Hearst Cablevision of California, Inc., The Helicon Group ltd., Insight Communications Company, L.P., McCaw Communications Companies, Inc., Nashoba Communications Limited Partnership, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Warner Cable Communications, Inc., and Whitcom Investment Company (Adelphia).
3. American Christian Television Services, Inc.
4. Association of Independent Television Stations, Inc.
5. California Cable Television Association
6. Joint Petition by Century Communication Corp., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., North Carolina CATV Association, OCB Cablevision, Inc., Ocean Associates, Perry Cable TV Corp., Riverview Cablevision Associates, St. Charles CATV, Inc., United Artists Cablesystems Corp., and United Cable Television Corp. (Century)
7. Continental Cablevision, Inc.
8. Corporation for Public Broadcasting, National Association of Public Television Stations, and The Public Broadcasting Service (CPB) Educational Broadcasting Corporation

10. Gill Industries, Inc.

11. Haley, Bader and Potts on behalf of Joint Broadcast Television Petitioners (Joint Broadcast Petitioners)

12. Lincoln Broadcasting Company

13. Joint Petition by the National Cable Television Association, Inc., the Community Antenna Television Association, and the National Association (Joint Industry Petition)

14. Supplemental Petition by the National Cable Television Association, Inc., and the Community Antenna Television Association (NCTA and CATA)

15. The National Association of Broadcasters

16. Range Television Cable Co., Inc.

17. Richard S. Leghorn

18. Spanish International Communications Corporation and Spanish International Network, Inc. (SICC)

19. Taft Broadcasting Company

20. Television Operators Caucus, Inc.

21. Joint Petition by Texas Cable TV Association; Virginia Cable Television Association; Georgia Cable Television Association; Multi-Channel TV Cable Co., and Buford Television, Inc. (Texas Cable)

22. Turner Broadcasting System, Inc.

23. WLIG-TV, Inc.

24. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert

25. The National Independent Television Committee

26. Midwest Television, Inc.

27. Tele-Communications, Inc., TKR Cable Company, and TCI-Taft Cablevision Associates (TCI)

28. Meredith Corporation
29. Hubbard Broadcasting, Inc.
30. Television Communications, Inc.

Opposing/Responding Parties

1. Association of Independent Television Stations, Inc.
2. The Corporation for Public Broadcasting (CPB), the National Association of Public Television Stations (NAPTS), and the Public Broadcasting Service (PBS) [CPB].
3. Richard S. Leghorn
4. Association of National Advertisers, Inc.
5. Pico Macom, Inc.
6. Marantha Broadcasting Company, Inc.
7. Tele-Communications, Inc.
8. National Association of Broadcasters

Replies To Responses

1. Joint Reply by Century Communications Corp., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., North Carolina CATV Associations, OCB Cablevision, Inc., Ocean Associates, Perry Cable TV Corp., Riverview Cablevision Associates, St. Charles CATV, Inc., United Artists Cablesystems Corp., and United Cable Television Corp. (Century)
2. Turner Broadcasting System, Inc.
3. National Cable Television Association, Inc.

4. Joint Reply by Adelphia Communications corporation, Arizona Cable Television Association, Bachow and Elkin, Inc., Coaxial Communications, The Essex Companies, Falcon Cable TV, Hauser Communications, Inc., Hearst Cablevision of California, Inc., The Helicon Group Ltd., Insight Communications Company, L.P., McCaw Communications Companies, Inc., Nashoba Communications Limited Partnership, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Warner Cable Communications, Inc., and Whitcom Investment Company (Adelphia).
5. Gill Industries, Inc.
6. Lincoln Broadcasting Company
7. Richard s. Leghorn
8. Association of Independent Television Stations, Inc.
9. The National Independent Television Committee

Appendix B

I. Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 521.

2. Section 76.5 is amended by reviewing paragraphs (d)(1), (d)(1)(ii), and (d)(2) and by adding a new paragraph (d)(3) to read as follows:

§76.5 Definitions.

* * * * *

(d) *Qualified station.* (1) Any television broadcast station, as defined in §76.5(b), except where such station would result in payment by the cable system of distant signal copyright fees, that with respect to a particular cable system:

(i) * * *

(ii) If a commercial station, receives an average share of total viewing hours of at least two percent and a net weekly circulation of at least five percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it initially commences operation under program test authority. Changes in station operations, for example, upgrade of facilities, transfer or assignment of license, or recommencement after operations have ceased, are not considered initial commencement of operations under this paragraph. The viewing standards of this paragraph shall not apply for one full year from June 10, 1987, to otherwise qualified stations that commenced operation after July 19, 1985, but before June 10, 1987 (the effective date of these rules). Once a commercial station has demonstrated that, on the basis of a full one-

year survey season, it meets the viewing standard, it will be considered to have satisfied this standard for the remainder of the period until June 10, 1992; Provided, however, that at any time after one year from one date a commercial station demonstrates that it meets the viewing standard, a cable system may nullify the station's mandatory signal carriage eligibility if it demonstrates, using the methodology specified in Section 76.55 of this Part, that the station no longer meets the viewing standard.

(2) Any noncommercial educational television station's translator with 5 watts or higher power serving the cable community.

(3) A full service station or translator qualifies as a noncommercial educational station for purposes of these rules if it is licensed to a channel reserved for noncommercial educational use pursuant to §73.606 of this chapter. The Commission also will consider whether stations operating on nonreserved channels qualify as noncommercial educational stations on a case-by-case.

3. Section 76.55 is amending by revising the introductory paragraph to read as follows:

§76.55 Qualified television station; method to be followed for showings.

A commercial television station shall demonstrate that, for the previous survey season, it meets the viewing standard specified in §76.5()(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

* * * * *

4. Section 76.56 is amended by removing paragraph (c)(2), redesignating paragraph (c)(3) as (c)(2) and retaining the NOTE following redesignated (c)(2), adding new paragraph (c)(3), an by revising paragraph (d) to read as follows:

§76.56 Mandatory carriage of television stations.

* * * * *

(c) * * *

(3) Is duplicated by another station that is carried; including where both a commercial parent station and its satellite station(s) qualify, and, in the case of noncommercial stations, where a parent station and its satellite and/or translator stations) qualify.

(d) A cable system shall not accept direct (monetary) payment or other indirect (nonmonetary) consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear any costs associated with delivering a good quality signal, as defined in paragraph (c)(2) of this section, to the cable system.

* * * * *

5. Section 76.60 is amended by revising paragraph 9a) to read as follows:

§76.60 Carriage of other television signals.

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television stations, and also may carry low power television stations, television translator stations, foreign television stations, satellite distributed program services, direct broadcast satellite stations and programming from any other sources.

* * * * *

6. Section 76.62 is amended by revising paragraph 9a)(2), redesignating paragraph (b) as paragraph (d) and adding new paragraphs (b) and (c) to read as follows:

§76.62 Manner of carriage.

(a) * * *

* * * * *

(2) the signal shall be carried without material degradation.

(b) Where a broadcast television station carried in fulfillment of the mandatory signal carriage obligations is carried on a tier of service, all signals carried in fulfillment of those obligations must be carried on that tier; Provided, however, that a signal carried in fulfillment of mandatory signal carriage obligations may be placed on a tier of service, reception of which requires separate terminal device, if such devices are provided free of charge to all subscribers.

(c) All broadcast television stations carried in fullfillment of mandatory carriage obligations must be included on the lowest-priced tier of service separately available to each cable subscriber. The tier of service on which such stations are carried also must be accessible on additional receiver connections which the subscriber. The tier of Service on which such stations are carried also must be accessible on additional receiver connections which the subscriber may purchase.

* * * * *

7. Section 76.66 is revised in its entirety to read as follows:

§76.66 Input selector switches and consumer education.

(a) A cable system operator shall offer to supply to each new subscriber and each existing subscriber an input selector switch for each separate television receiver for which cable service is provided by the cable operator. The operator shall comply with the following in offering the switch and installing cable service:

(1) Offer to supply and install a switch for all new and existing subscribers within six months of June 10, 1987, and thereafter on an annual basis until June 10, 1992,

unless the subscriber already has an input selector switching device or his/her television receiver has such a device built-in;

(2) A cable operator may charge for the purchase or lease of switches and associated hardware and may separately charge for installation of switches for existing subscribers. However, a cable operator may not charge new subscribers a separate fee for switch installation.

(3) A cable system operator is not required to provide a switch to any subscriber who declines the required offer, but is not thereby relieved from making the offer to any such subscriber thereafter on an annual basis;

(4) The switch offer shall be made using text chosen by the cable operator that includes the following points:

(i) An offer to supply an input selector switch for each separate television receiver to which cable service is provided;

(ii) The switch connects both to the cable service and an antenna, and enables selection between cable service and off-the-air broadcast television signals;

(iii) If the subscriber already has switching capability, either in a separate device or as a built-in feature of his/her television receiver, an additional switch may not be needed;

(iv) If the subscriber desires switching capability, he/she may have the cable system install a switch or may obtain a switch from it with written self-installation instructions;

(v) Switching capability may be obtained from other from other suppliers; and,

(vi) For the subscriber's convenience, attach an offer response form to be returned to the cable system's business office.

(5) Comply with the following requirements with respect to antennas:

(i) If an antenna is present, the operator shall not recommend that the antenna be removed;

(ii) If an antenna is not present, the operator shall inform the subscriber that the switch will be operational only if it is connected to an antenna;

(iii) Where the operator installs a switch and an antenna is present, it shall connect the switch to that existing antenna.

(b) Individual cable subscribers are not required to purchase or lease input selector switches from their cable system. Subscribers may obtain such switches from suppliers other than their cable systems. Although cable subscribers are encouraged to establish and maintain independent access to off-the-air broadcast signals, they are not required to do so.

(c) The cable system operator shall provide the following information to each subscriber at the time of installation of cable service and to existing subscribers, in writing, within six months after June 10, 1987, and annually thereafter to all subscribers, using whatever language the operator deems appropriate to convey the following:

(1) Until June 10, 1992, the cable system may not be required to carry all broadcast signals available off-the-air in the community, and that,

(2) After June 10, 1992, the cable system will no longer be required to carry any broadcast signals; and thus,

(3) It may be necessary to use an antenna, in conjunction with an input selector switch, to access broadcast signals available off-the-air and not carried by the cable system;

(4) A description of the function of an input selector switch and state that its purpose is to aid the viewer in preserving independent access to off-the-air television service;

(5) That input selector switches may be obtained from suppliers other than the cable system and that there may be a range of switch options available, such as simple manual cable/broadcast switches, multiple input sources switches, electronic switches, remote control switches, and receivers with built-in switches;

(6) Identify for their subscribers, by call sign and channel number, any full service broadcast signals not carried on the cable system whose predicted Grade B contour covers any portion of the cable community or that are "significantly viewed" in the cable community, as defined in §76.5(k) of the rules (the list of stations must be current to within one month of the distribution of the information required pursuant to this paragraph);

(7) Indicate that questions related to input selector switches should be directed to a specified individual at the cable system and provide a telephone number at which that person can be reached.

8. Section 76.67 is amended by revising paragraph (a) to read as follows:

§76.67 Sports broadcasts.

(a) No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the community unit meeting the criteria specified in §§76.5(ii)(1) - 76.5(ii)(3) of this part. For purpose of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or local team is identified, or, if the event or local team is not identified with

any particular community, the nearest community to which a television station is licensed.

* * * * *

9. New Section 76.70 is added to read as follows:

§76.70 Exemption from input selector switch and mandatory signal carriage rules.

(a) Cable systems serving communities where no portion of the community is covered by the predicted Grade B contour of at least one full service broadcast television station or noncommercial educational television translator station operating with 5 or more watts output power and where the signals of no such broadcast stations are "significantly viewed" in the county where the cable community is located shall be exempt from the provisions of §76.66 of this chapter. Cable systems may be eligible for this exemption where they demonstrate with engineering studies prepared in accordance with §73.686 of this chapter and other showings that broadcast signals meeting the above criteria are not actually viewable within the community.

(b) Where, prior to June 10, 1992, a new full service broadcast television station, or a new noncommercial educational television translator station with 5 or more watts, or an existing such station of either type with newly upgraded facilities provides predicted Grade B service to a community served by a cable system previously exempt under paragraph (a) of this section, or the signal of any such broadcast station is newly determined to be "significantly viewed" in the county where such a cable system is located, the cable system at that time is required to comply fully with the provisions of §76.66 of this chapter. Cable systems may retain their exemption under paragraph (a) of this section where they demonstrate with engineering studies prepared in accordance with §73.686 of this chapter and other showings that broadcast signals

meeting the above criteria are not actually viewable within the community.

(c) Where the changed circumstances described in paragraph (b) of this section occur after June 10, 1992, the cable system at that time will be required to comply only with the provisions of §76.66(d) remaining in effect.

10. Section 76.617 is amended by designating the present undesignated text as paragraph (a), and by adding new paragraph (b) to read as follows:

§76.617 Responsibility for interference.

(a) Interference generated by a radio or television receiver shall be the responsibility of the receiver operator in accordance with the provisions of Part 15, Subpart A of this chapter: Provided, however, That the operator of a cable television system to which the receiver is connected shall be responsible for the suppression of receiver-generated interference that is distributed by the system when the interfering signals are introduced into the system at the receiver.

(b) Interference resulting from the use of an input selector switch shall be the responsibility of the switch operator in accordance with the transfer switch provisions of Part 15 of this chapter: Provided, however, That the operator of a cable television system to which the switch is connected shall be responsible for suppression of emissions of RF energy resulting from use of input selector switches that are in excess of the Signal leakage and radiation limits of part 76 of this chapter.

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO
CONCURRING-IN-PART AND DISSENTING-IN-PART

Re: Amendment of Part 76 of the Commission's Rules concerning Carriage of Television Broadcast Signals by Cable Television Systems.

My separate statement to the *Report and Order* stated that the must-carry rules adopted in this proceeding are the very minimum I can support. The petitions for reconsideration and responsive pleadings strengthen my belief that the only reasonable solution to the problems confronting the Commission is a permanent must-carry rule. Thus, while I support the must-carry rules adopted by the Commission in its *Memorandum Opinion and Order*, the legal justifications employed, as well as the sunset provision, constrain me from endorsing wholeheartedly the decision in its entirety.

At the outset, no evidence has been presented causing me to revise my previous observations regarding the geographic monopoly bottleneck of cable systems.[1] Once in-

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[1] Congress recognized the ability of cable to behave as a bottleneck when adopting the Cable Communications Policy Act. While discussing the constitutionality of the Act's access provisions, the House Report said:

> If these [cross ownership rules] are permissible, then surely a less restrictive regulation that does not absolutely ban speech through the cable medium, but requires only some *limited sharing of bottleneck facilities* on a content neutral basis, is also valid. (emphasis supplied)

H.R. Rep. No. 98-934, 98th Congress., 2nd Session, August 1, 1984 at 33. Moreover, the courts have found that cable may be considered a natural monopoly, thereby allowing a city to "offer a de facto exclusive franchise in order to create competition for its cable television market. *See e.g., Central Telecommunications Inc. v. TCI*, 610 F.Supp. 891 (D.C. Mo. 1985). *aff'd* 800 F.2d 711 (8th Cir. 1986), *cert. denied* __U.S. __ (1987)

stalled, cable becomes the gatekeeper for the distribution of video product into the home. Unlike broadcasting, cable has little or no programming accountability to any government authority. I still believe the Commission made a tragic mistake by not appealing the *Quincy* decision.[2] I also believe it was error to stay implementation of the must-carry rules while the reconsideration was pending.[3]

My overall views are set forth in my separate statement accompanying the Commission's *Report and Order*.[4] Because the rules—in particular the input selector switch rules—adopted on reconsideration are different from the rules adopted in August, I believe further explanation of my position is warranted.

I would have preferred the Commission to place greater emphasis on the statutory obligations imposed by Section 307(b) of the Act. Localism is one of the cornerstones of communication policy and should have served as the primary legal basis for the must-carry rules and consumer education requirements. It is obvious the Supreme Court recognizes localism as a substantial government interest,[5]

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[2] *Quincy Cable TV, Inc. v. FCC* 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] *See Order*, FCC 86-575 (released December 24, 1986).

[4] *Report and Order* in MM Docket No. 85-349, 1 FCC Rcd. 864, 912 (1986) (Quello, concurring).

[5] The Supreme Court has stated:

> There can be little doubt that the comprehensive regulations developed over the past twenty years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of view-

a fact recognized by the *Quincy* court.[6] The point of departure in *Quincy* was that the Commission did not, at that time, demonstrate that our 307(b) policies would be at risk absent must-carry rules.[7]

The record in this proceeding demonstrates that must-carry obligations are necessary to maintain the integrity of our allocation scheme and to promote service to the local community.[8] Evidence to support this proposition is

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ers. *See e.g., Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d, at 744-746. To accomplish this regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems.

Capital Cities Cable Inc. v. Crisp, 104 S.Ct. 2694, 2708 (1984). *See also National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

[6] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1454 n. 43.

[7] Writing for the court Judge J. Skelly Wright stated:

> We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. *Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment.* As long as it continues to rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done. (emphasis supplied)

Id. at 1459.

[8] *See* Comments of the Association of Independent Television Stations Inc.; Television Operators Caucus, Inc.; National Association of Broadcasters; and Letter from Senator John C. Danforth, Chairman, Com-

clear and convincing. Since the *Quincy* decision, more than 180 public television stations have been dropped from carriage.[9] The record also demonstrates that numerous commercial stations have been dropped? refused initial carriage or charged exorbitant fees to either secure carriage or maintain the same channel position on cable that they were assigned by the FCC.[10]

The damage to our local allocations scheme is exacerbated when we realize two facts. First, the cable industry has taken extraordinary steps to ensure cable systems do not drop signals or refuse carriage while this proceeding is pending.[11] Second, there are strong competitive incentives for local cable systems to drop or refuse carriage to broadcast stations. The cable industry is aggressively selling commercial time in local markets in competition with local broadcasters. Our decision last August expressly recognizes this fact.[12] I believe the evidence contained in the record reflects merely the tip of the iceberg With regard to the danger to our allocations scheme. Given the competitive incentives To drop local signals—which the *Report and Order* expressly recognizes—I believe we have moved

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mittee on Commerce, Science and Transportation to Honorable Mark Fowler, dated July 22, 1986, at 4.

[9] *See* Opposition of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service to Petitions for Reconsideration at 11 n. 12, *citing* letter of the National Association of Public Television Stations, Peter M. Fannon, President, January 30, 1987.

[10] *See* Consolidated Opposition of the National Association of Broadcasters to Petitions for Reconsideration Appendix B; Comment Association of Independent Television Stations Inc.

[11] *See* Comments of the Independent Television Association of Independent Television Stations, Inc. at 6, *citing* Address of Edward Allen, Chairman, National Cable Television Association, to the Washington Metropolitan Cable Club, September 18, 1985.

[12] *Report and Order* in MM Docket No. 85-349, 1 FCC Rcd. 2314, 2331 (1986).

far beyond the "more or less intuitive model' criticized by the *Quincy* court.

It is significant that both the *Report and Order* and the *Memorandum Opinion and Order* state expressly that the decision "contributes to 307(b)" objectives by fostering independent access to local off-the-air television.[13] If our policies result in the effective use of A/B (input selector) switch technology, then the decision comports with our 307(b) objectives. However, as I have stated on previous occasions, the efficacy of the A/B (input selector) switch option is doubtful. Furthermore, while I generally agreed with lessening the burden of a mandatory switch requirement, the optional approach adopted by the Commission makes the effectiveness of the A/B (input selector) switch even more questionable. In fact, it is difficult to distinguish the obligations imposed by the new input selector switch rules from the status quo. Subscribers have always had the option to purchase an A/B switch. The only real difference between this decision and the current state of affairs is the consumer education program. Whether the "new awareness" of the need for an A/B switch and outdoor antenna will achieve its intended purpose—independent access of off-air signals—remains questionable.

While I disagree with the majority's conclusions that tend to minimize the magnitude of the threat to our 307(b) policies, the decision today does not abandon this statutory obligation. The decision, in my mind, does not serve as precedent for the proposition that the Commission is no longer concerned with the economic effects of the cable industry on local over-the-air television.[14] Indeed, the con-

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[13] *Memorandum Opinion and Order* at para. 49.

[14] The unbalanced market relationship between cable and broadcasting was a factor in the Commission's decision to propose new syndicated exclusivity rules. *Notice of Inquiry* in General Docket No. 87-24, FCC 87-65, ___FCC Rcd. ___(released April 23, 1987). We observed there that "repeal of the syndicated exclusivity rules may have unduly shifted

sumer education program and the interim rules are designed to facilitate access to *local* broadcast signals. Therefore, the decision in this docket is cast in the context of a perceived lack of harm To our 307(b) policies. The result may be far different if evidence becomes available That cable systems are in fact preventing access to over the air broadcasting.

To the extent the *Memorandum Opinion and Order* can be construed as promoting 307(b) solely by maximizing "consumer choice," then I must disagree. First, absent an effective A/B switching arrangement, the cable, consumer does not have the choice of tuning in a local signal where the cable system has decided to delete the station. The channel simply will not be made available. Second, dropping signals may lead to existing stations going dark or, if payment is required for carriage, drain funds from program acquisition and production. Moreover, uncertainty over carriage hinders the financing of new stations in the market. Together, these factors serve to limit "consumer choices" not only for cable subscribers but also for non-subscribers.

While the ability to choose local broadcast programming is an important component of Section 307(b), the Commission's statutory requirements go beyond merely pro-

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the competitive balance in cable's favor and against other programming outlets." *Id.* at para. 7. Concerns over the market place imbalance between cable and broadcasting were also expressed in our recent decision to examine the compulsory copyright license. *Notice of Inquiry* in General Docket No. 87-25, FCC 87-66, __FCC Recd. __(released April 23, 1987). The Commission's concerns with the economic relationships between the two media and its desire to provide a "level playing field" in those proceedings are applicable to the instant docket. In terms of priority, the issue of signal carriage has greater economic significance to local broadcasting than either syndicated exclusivity or the compulsory license.

viding cable subscribers with the freedom to choose.[15] Because broadcasters are obligated by statute to serve their local communities, it is incumbent upon the Commission to ensure those signals are, in fact, accessible.[16] Thus, if the means selected by the Commission to ensure independent off-air access proves ultimately to be ineffective, then the Commission has an obligation to revisit the issue.

Finally, I must take exception to the statement that protecting broadcasting *per se* in furtherance of 307(b) would have the effect of limiting choices. This is simply not true. Such a possibility exists only where the channel capacity of cable systems are so limited as to force a choice between local signals and cable programming. While this may be the case with older small-capacity cable systems, those systems being constructed today are not presented with this dilemma.[17] In fact, there is excess capacity on

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[15] While the majority choose not to emphasize this point, the Commission's decision in Television Deregulation creates an obligation to provide issue responsive programming to its community of license. *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984) *recon. denied* 104 FCC 2d 357 *appeal pending sub nom. Action for Children's Television v. FCC* No. 86-1425 (D.C. Cir., filed July 23, 1986). This obligation stems not only from interpretation of the public interest standard, *See Office of Communications United Church of Christ v. FCC*, 707 F2d 1413, 1429 n. 46 (1983) but also from Section 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207 *cert. denied* 76 S.Ct. 650 (1956).

[16] It would appear our current regulations requiring a licensee to place a city grade signal over its community of license become somewhat superfluous if a significant percentage of the population subscribes to cable and is unable to receive the licensee's signal. *See* Section 47 C.F.R. Section 73.685(a).

[17] Approximately 88 percent of existing cable systems have channel capacity greater than 20 channels. Fifty-nine percent of existing cable systems have between 30-50 channels. Thirteen percent have a channel capacity above 54 channels *Television and Cable Fact Book: Cable and Services Volume*, No. 54 (1986 Ed.) at A-45.

many of these new cable systems. Problems presented by lack of channel capacity will diminish greatly in the future. As a result, the Commission can further its 307(b) policies without diminishing overall service to the public.[18]

I strongly disagree with the Commission's decision to sunset the must-carry rules. Sunsetting the rules without the benefit of experience with our interim rules and education program is—to put it kindly—premature. Our decision is particularly inappropriate in light of the optional switch rules adopted on reconsideration. While burdensome, the required A/B (input selector) Switch rule adopted last August at least ensured that the switches would be placed in the home. The optional switch rule offers no such assurance. Our new policy seems to argue for a more cautious approach regarding elimination of signal carriage rules.

I fully recognize the importance of balancing First Amendment rights of cable operators with the necessity of protecting our broadcast allocations scheme. When it reviewed our former must-carry rules, the *Quincy* court seized upon both the A/B switch, as a less restrictive alternative to signal carriage obligations, and our failure to determine whether the switch would in fact work.[19] Evi-

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[18] I believe that program choices from nonbroadcast sources, *e.g.*, cable satellite or nonlocal broadcast stations, should not be considered as enhancing our localism objectives. Section 307(b) is applicable only to radio and television broadcasting and does not necessarily apply to these alternate video sources. *See National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (distinguishing DBS service from local broadcasting). Furthermore, I doubt the Commission would want to subject satellite programming to the regulatory regime envisioned by Section 307(b).

[19] Concerning the Commission's assumptions of the efficacy of the A/B switch the *Quincy* Court stated:

> In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective

dence contained in the record demonstrates that while the technology may be sufficient, switches may not be utilized. Therefore, the A/B switch may not, as a practical matter, be a viable alternative. Under the *Quincy* Court's own analysis, signal carriage rules appear to be the most narrowly tailored means of ensuring access to local broadcast signals. Accordingly, I believe a must-carry rule would pass muster under the *O'Brien* standard as articulated by the *Quincy* Court even absent a sunset provision.

I regret that we have not adopted broader and permanent must-carry rules. Nevertheless, I believe the rules adopted today establish a minimum base line for protecting the Commission's localism concerns.[20] The consumer education program and the interim rules are sufficiently tailored to meet the *Quincy* court's requirements. While the principal rationale established by the majority is sufficient to support the interim rules, I believe that the need to promote localism—a goal which my colleagues state is facilitated by the decision—should have been the focal point of our analysis.

I look forward to our oversight of the consumer education program as well as receiving data on the efficacy of the A/B (input selector) switch. I have no doubt that, during the next five years, my colleagues and the Court will come to see the wisdom of a permanent signal carriage rule.

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regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device that would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the vitality of local broadcasting.

Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1457.

[20] *Id.* at 1461.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1683 **September Term, 1987**

CENTURY COMMUNICATIONS CORPORATION, et al.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

INDEPENDENT TELEVISION STATIONS, INC., SPANISH INTERNATIONAL COMMUNICATIONS CORPS., UNIVISION, INC., THE NATIONAL ASSOCIATION OF BROADCASTERS, LINCOLN BROADCASTING CO., NATIONAL CABLE TELEVISION ASSOCIATION, et al., OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, CORPORATION FOR PUBLIC BROADCASTING, NATIONAL ASSOCIATION OF PUBLIC TELEVISION, PUBLIC BROADCASTING SERVICE, NATIONAL BROADCASTING CO., INC., SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
Intervenors

FILED DEC 11 1987
GEORGE A. FISHER
Clerk

No. 87-1280

RICHARD S. LEGHORN,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1683 et al. **September Term, 1987**

PAGE TWO

No. 87-1301

HUBBARD BROADCASTING, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondent

CORPORATION FOR PUBLIC BROADCASTING, et al.,
Intervenors

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: WALD, Chief Judge, MIKVA, Circuit Judge, and McGOWAN, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Communications Commission under review herein are hereby vacated, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/GEORGE A. FISHER
George A. Fisher
Clerk

Date: December 11, 1987
Opinion for the Court filed by Chief Judge Wald.